Supreme Court, U.S.
FILED
COPY

No.

10-136 JUL 20 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

In the Supreme Court of the United States

ROBERT HOREL, WARDEN, *Petitioner*,

v.

FELIX SOLORIO VALDOVINOS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Jeremy.Friedlander@doj.ca.gov
Counsel for Petitioner

QUESTION PRESENTED

Whether AEDPA deference applies to the state supreme court's summary denial of a claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010) (No. 09-587).

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari 1
Opinions Below 1
Jurisdiction 1
Relevant Statutory Provisions 1
Statement of the Case 2
A. State court trial and appeal 2
B. First state habeas corpus petition 5
C. First federal habeas corpus petition 6
D. Second state habeas corpus petition 8
E. Amended federal petition 8
F. The Ninth Circuit's decision 9
Reasons for granting the writ 10
I. The court of appeals erroneously granted relief by considering *de novo*, rather than deferentially under 28 U.S.C. § 2254(d), the *Brady* claim the state supreme court had summarily denied on the merits. 10
A. The court of appeals erred by considering the expanded *Brady* claim *de novo* 11
B. Under deferential review, the court of appeals would be compelled to reject the *Brady* claim. 14

TABLE OF CONTENTS
(continued)

Page

1. The Mongia photograph 14
2. The anonymous letter 16
3. The photographic lineups 17
4. The gun and drugs in Lopez's bedroom 21
5. Evidence ignored by the Ninth Circuit 22

Conclusion 24

TABLE OF AUTHORITIES

Page

CASES

Brady v. *Maryland*
373 U.S. 83 (1963)..... passim

Griffey v. *Lindsay*
345 F.3d 1058 (9th Cir. 2003)..... 13

Harrington v. *Richter*
130 S.Ct. 1506 (2010)..... 10, 11, 23

Hunter v. *Aispuro*
982 F.2d 344 (9th Cir. 1992)..... 13

In re Clark
855 P.2d 729 (Cal. 1993)..... 13

In re Robbins
959 P.2d 311 (Cal. 1998)..... 13

Kyles v. *Whitley*
514 U.S. 419 (1995)..... 23

Rhoades v. *Henry*
596 F.3d 1170 (9th Cir. 2010)..... 16

Richter v. *Hickman*
578 F.3d 944 (9th Cir. 2009) (en banc) 12

Schriro v. *Landrigan*
550 U.S. 465 (2007)..... 13

TABLE OF AUTHORITIES
(continued)

Page

Strickland v. *Washington*
466 U.S. 668 (1984) 10

United States v. *Ladoucer*
573 F.3d 628 (8th Cir. 2009) 16

United States v. *Wilson*
901 F.2d 378 (4th Cir. 1990) 16

Ward v. *Hall*
592 F.3d 1144 (11th Cir. 2010) 16

Wood v. *Bartholomew*
516 U.S. 1 (1995) 17

Yarborough v. *Alvarado*
541 U.S. 652 (2004) 13

STATUTES

28 United States Code
§ 1254(1) 1
§ 2254 1
§ 2254(d) 10, 11, 14

COURT RULES

Supreme Court Rule
No. 13.3 1

INDEX TO APPENDIX

Page

Published Opinion by Ninth Circuit Court of Appeals, filed March 10, 2010 ..... 1a

Order Denying Petition for Writ of Habeas Corpus by United States District Court for the Northern District of California, filed March 12, 2008 ..... 26a

Order Denying Petition for Writ of Habeas Corpus by California Supreme Court, filed December 19, 2001.....80a

Order Denying Petition for Writ of Habeas Corpus by California Supreme Court, filed July 26, 2006 ..... 81a

Opinion by Court of Appeal of the State of California, Sixth Appellate District, filed August 23, 2000 .....82a

Order Denying Petition for Panel Rehearing by Ninth Circuit Court of Appeals, filed April 26, 2010.....106a

Valdovinos's Second State Habeas Petition and Table of Contents from Supporting Points and Authorities.....108a

PETITION FOR WRIT OF CERTIORARI

Robert Horel, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-25a) is reported at 598 F.3d 568. The order of the court of appeals denying rehearing and rehearing en banc (App. 106a), the order of the district court denying habeas corpus (App. 26a-79a), the orders of the state supreme court summarily denying habeas corpus (App. 80a, 81a), and the opinion of the state appellate court affirming the criminal conviction on direct appeal (App. 82a-105a) are unreported.

JURISDICTION

The opinion of the court of appeals was filed on March 10, 2010. App. 1a. An order denying the Warden's petition for rehearing and rehearing en banc was filed on April 26, 2010. App. 106a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits

> in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

A. State Court Trial and Appeal

In May 1998, Nelson Caballero was shot twice, execution-style, outside a San Jose nightclub by a man who wore a cowboy hat and dark leather jacket and fled in a car. Respondent Valdovinos was arrested a month later in Oregon, shortly after authorities located his car there. The license plates had been removed. App. 90a; ER 437-40. [1] Valdovinos had $3,000 to $7,000 in cash (ER 479), but he had left behind his paycheck (App. 90a) at his janitorial job in San Jose (RT 203-04).

Valdovinos was charged with first degree murder. At trial, three acquaintances of the victim—Joaquin Diaz, Tracy Castro, and Kyong "Say" Miranda—identified Valdovinos as the shooter. App. 3a. Other evidence established that Valdovinos's car generally matched contemporaneous descriptions of the getaway vehicle. App. 75a, 87a; ER 251-52, 359-60, 390; RT 125, 132, 149. Shown a photo of Valdovinos's car, Castro identified it as the one in which the killer left the scene. ER 360.

Aurelio Lopez was Valdovinos's roommate and cousin. App. 83a. At the preliminary hearing, he

---

[1] "ER" refers to the Excerpts of Record, "SER" to the Supplemental Excerpts of Record, and "RT" to the Reporter's Transcript of the trial.

testified equivocally that Valdovinos had what looked like a gun at the club and that, just before the shooting, Valdovinos was talking to a group of persons that included Caballero. App. 46a-47a, 86a; ER 228, 489-90. Cross-examined at the preliminary hearing by the defense about his prior statement to the police that Valdovinos had a gun, Lopez testified that he had told the police what they wanted to hear and that he had feared he himself might be a suspect in the killing. App. 31a, 52a, 87a, 89a, 93a. After Lopez absconded on the eve of trial, his preliminary hearing testimony and his post-arrest statement to the police were read to the jury. App. 34a, 46a-49a, 86a, 93a.

Isidro Garcia, another of Valdovinos's roommates (App. 30a), said Valdovinos was at the club and wore a gray cowboy hat, black leather jacket, and boots. App. 86a. Garcia testified that Lopez wore the same thing, but he was impeached with his statement to the police that Lopez had worn a brown baseball cap. App. 30a, 90a. Garcia said he himself was hatless. App. 30a.

Testimony at trial revealed for the first time that four days after the crime the police found an ounce of methamphetamine and a nine-millimeter handgun (not the murder weapon— SER 110-12) in Lopez's bedroom. App. 89a, 93a-94a; ER 416. Lopez was arrested at that point, both on an earlier warrant for gun and drug possession and for the possession of the gun and drugs in his bedroom, but the latter incident produced no charges against Lopez. App. 89a. The arrest report from the incident was filed in Lopez's case but not in the homicide case. App. 94a; ER 464-65.

As with the gun and drugs found in Lopez's bedroom, the prosecutor and defense counsel also learned at trial for the first time that the police had

shown two photographic lineups to eyewitnesses Diaz and Castro. App. 100a; ER 332-33; People's Exhs. 17, 18. Diaz had chosen Valdovinos's photo in both lineups but was unsure of his identifications. App. 89a, 90a. He could not say whether the photograph he selected in each lineup was the same person. RT 354. He was uncertain about the first lineup because the shooter had worn a hat, whereas no one in that lineup wore one. ER 347. No one in the second lineup wore a hat either. See ER 353. At trial, Diaz did not recognize Valdovinos as the person he selected in the lineups. ER 349.

Castro had chosen photographs of different persons in each lineup, and neither one depicted Valdovinos. App. 88a, 90a.

Though Valdovinos was the only person in both lineups, his appearance differed markedly in each lineup and differed from his appearance at trial as well. App. 55a, 56a. The persons in the second lineup had shorter hair than the persons in the first one. App. 56a; ER 353. Valdovinos had a mustache in the lineup photographs but not at trial. ER 352. Lopez was in neither lineup. App. 31a, 90a. Lopez and Valdovinos were of a similar size and stature (App. 32a), but a detective denied that they looked alike. ER 466. No one suggested otherwise. A photograph of Lopez was in evidence at trial. RT 549, 560; People's Exh. 20.[2]

The defense sought a mistrial based on the delayed disclosures of the photo lineups and Lopez's possession of a handgun and drugs. The trial court denied the request. App. 93a-94a, 100a. However,

---

[2] In federal court, Valdovinos supplied a photograph of Lopez from a police report. ER 141. The written record does not establish whether that photograph was the one admitted at trial.

the court instructed the jury that the prosecution had unjustifiably "concealed and/or failed to timely disclose" the photo lineups. App. 33a n.6, 100-01a. Defense counsel subsequently argued to the jury that Lopez's nonappearance at trial and the decision not to charge him with the gun and drugs in his bedroom showed that he had incriminated Valdovinos in exchange for his own freedom. RT 666-67. Counsel further suggested that Lopez might be the killer. App. 95a-96a. Counsel argued that the belated disclosure of the lineups was "sloppy police work" or even "deliberate concealment," that Castro could not identify Valdovinos, that Diaz was a felon on probation who identified the person the police wanted identified, and that the killing was a "drug deal gone bad." App. 45a, 96a, 101a-02a. The prosecutor argued that both the direct and circumstantial evidence proved Valdovinos was the shooter whether or not the killing stemmed from a drug deal. RT 678.

The jury returned a verdict of first degree murder and found that Valdovinos personally used a firearm and proximately caused injury to the victim by discharging it. App. 91a.

The California Court of Appeal affirmed the judgment, rejecting (among other claims) the one that the untimely disclosure of the photographic lineups violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). App. 64a, 95a-96a, 101a-02a.

B. First State Habeas Corpus Petition

Valdovinos did not petition for direct review of the state appellate court decision. App. 36a. Instead, Valdovinos submitted to the California Supreme Court a habeas corpus petition in which he asserted, among other claims, that the state had violated

Brady by its untimely disclosures at trial of the photo lineups and the drugs and gun from Lopez's bedroom. See App. 36a. The state supreme court denied the petition (App. 7a, 36a), stating simply, "The petition for writ of habeas corpus is DENIED." App. 80a.

C. First Federal Habeas Corpus Petition

Valdovinos filed a federal habeas corpus petition, again asserting a *Brady* violation based on the belated disclosure of the lineups and Lopez's gun and drugs. SER 7, 56-60. In response to one of Valdovinos's claims of ineffective assistance of counsel (SER 7, 60-78), the state tested Lopez's gun, determined that it was incompatible with the murder weapon, and advised the district court, SER 110-12.

In a traverse, Valdovinos's appointed habeas counsel referred to items discovered by associate habeas counsel in a police case file and allegedly not disclosed to the defense. One was a photograph depicting Jose Mongia, a Hispanic male wearing a dark cowboy hat and a dark jacket. Mongia was one of several witnesses the police interviewed at the nightclub after the shooting. App. 7a-8a, 26a, 62a; ER 131. Another item in the case file was an anonymous letter, written in Spanish and addressed to a relative of Caballero's. App. 7a, 61a, 71a-72a; ER 153-54. According to the defense investigator's translation of the letter, the author denied knowing who the shooter was but said that a man named Ramon Balemas had contracted for the victim's murder over a drug debt. App. 7a, 61a, 72a-73a; ER 150-51. The record does not show when the authorities received the letter or what, if anything, the defense did to try to find out when.

A three-sentence declaration by trial counsel asserted his unawareness of the letter, but the

declaration was silent as to whether he knew of the Balemas drug-hit story. App. 73a; ER 157. Trial counsel also did not say how, if it all, disclosure of the letter might have affected the defense investigation. App. 73a; ER 157. Nor did trial counsel mention any photograph. ER 157.

In an apparent response to the state-ordered test that ruled out Lopez's handgun as the murder weapon (SER 110-12), the traverse also included a declaration from associate habeas counsel in which she stated what one Juan Ledezma had told her. According to her, Ledezma said Aurelio Lopez told him that Lopez had had *two* guns, one nine millimeter and one "380" (the caliber of the murder weapon). Ledezma also reportedly said that Lopez had admitted to Ledezma that Lopez was the killer and that he had blamed Valdovinos. App. 7a, 61a-62a; ER 126-27. Accompanying habeas counsel's declaration was an unauthenticated, untranslated statement in Spanish, purportedly written by Ledezma. App. 74a; ER 130. Associate habeas counsel said she was unable to prepare a formal declaration for Ledezma to sign because he was leaving for Mexico that afternoon. ER 126, 127.[3]

The district court ruled that the additional evidence in the traverse rendered "unexhausted" three of the claims in Valdovinos's petition, including the *Brady* claim and an ineffective assistance of counsel claim. App. 8a, 26a-27a, 36a.

---

[3] The district court found that the Ledezma statement was not *Brady* material, inasmuch as there was no claim that the prosecution or police had ever known of the statement or of Ledezma. App. 74a-75a. The court of appeals agreed with the district court's conclusion on that point. App. 16a.

D. Second State Habeas Corpus Petition

Valdovinos returned to state court and raised his newly revised claims in a second habeas corpus petition. App. 8a, 36a-37a, 108a-22a. Valdovinos framed his *Brady* claim by aggregating the belatedly disclosed evidence with the allegedly undisclosed evidence. He wrote: "The prosecution violated Brady . . . by not disclosing evidence of the gun, Lopez's favorable treatment, the pictures of others dressed like Valdovinos, photographic lineups, and the letter describing the killing as a contract killing." App. 120a (title of claim, from table of contents in memorandum of points and authorities supporting second state habeas petition); block capitalization omitted. The California Supreme Court denied the second petition (App. 8a, 37a) exactly as it had denied the first one: "Petition for writ of habeas corpus is DENIED." App. 81a.

E. Amended Federal Petition

Back in federal court, Valdovinos moved to amend his federal petition with the newly exhausted claims. App. 8a, 9a, 27a. The district court granted the motion over the Warden's opposition (ER 56; see App. 9a-10a, 12a-13a, 13a-14a, 27a) and denied the Warden's motion for authorization to file an interlocutory appeal, ER 54.

The district court denied the amended petition on the merits. App. 8a, 27a, 79a. After considering collectively the information belatedly disclosed at trial and the allegedly undisclosed material found by habeas counsel in the state's files, the court concluded that the alleged *Brady* material "fails to raise a doubt about the outcome of the trial." App.

75a. The court noted strong eyewitness testimony, the similarity of Valdovinos's car to the getaway vehicle, and Valdovinos's flight to Oregon. *Id.*

F. The Ninth Circuit's Decision

The court of appeals reversed the district court and instructed it to grant a conditional writ. App. 25a. Finding *Brady* error (App. 14a, 22a, 24a), the court of appeals held that Valdovinos had been denied a fair trial by "the cumulative effect of the suppressed evidence" (App. 22a), namely, the gun and drugs in Lopez's bedroom, the photo lineups, Mongia's photograph, and the anonymous letter. App. 16a-22a; see App. 24a (concluding that the "collective effect of the *Brady* evidence was material. . . .").[4] The court did not address the state supreme court's denial of Valdovinos's revised *Brady* claim in his second state habeas corpus petition, nor did it mention the deferential standard of review required by section 2254(d).

On April 26, 2010, the court of appeals denied the Warden's petition for rehearing and rehearing en banc. App. 106a. The court granted the Warden's motion to stay the mandate.

---

[4] In view of its finding that the *Brady* violations warranted habeas relief, the court of appeals found it unnecessary to consider "the cumulative prejudice of the *Brady* violations with the ineffective assistance of counsel claim." App. 24a n.4.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRONEOUSLY GRANTED RELIEF BY CONSIDERING *DE NOVO*, RATHER THAN DEFERENTIALLY UNDER 28 U.S.C. § 2254(d), THE *BRADY* CLAIM THE STATE SUPREME COURT HAD SUMMARILY DENIED ON THE MERITS.

In *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010), 09-587, a case pending in this Court and involving a Ninth Circuit grant of habeas corpus relief on a claim summarily rejected by the California Supreme Court, this Court directed briefing on the following question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U.S. 668 . . . ?" An affirmative answer by the Court to that question should compel the denial of a writ of habeas corpus in this case because of two factors. First, the court of appeals here granted the writ by conducting *de novo* review of a claim the California Supreme Court had summarily denied. Second, Valdovinos's claim would have to be rejected under a deferential review.

The appellate court committed at least four major errors in addition to using *de novo* review. It unjustifiably assumed the defense was unaware of undisclosed information. It considered evidence the prosecution disclosed at trial as if the prosecution had never disclosed it. It inflated the importance of both the undisclosed and belatedly disclosed information. And it ignored uncontested trial evidence establishing that Valdovinos was the killer. As a result, the circuit court failed to recognize that the state supreme court could reasonably have rejected the notion that the "collective effect of the *Brady* evidence was material. . . ." App. 24a. If anything, the record not only permitted but

compelled the state supreme court's presumptive conclusion that Valdovinos's fully revised *Brady* claim lacked merit. Therefore, if this Court were to decide in *Harrington* v. *Richter* that claims summarily denied in state court require deferential review, the circuit court would have to deny habeas corpus in this case.

A. The Court of Appeals Erred by Considering the Expanded *Brady* Claim *De Novo*.

The Ninth Circuit did not consider, much less review deferentially under section 2254(d), the California Supreme Court's rejection of Valdovinos's revised *Brady* claim. The panel's analysis did not purport to review any state-court adjudication of the revised *Brady* claim for reasonableness under section 2254(d) but instead framed its analysis only in terms of direct *de novo* review of the claim. In contrast, the panel reviewed for section 2254(d) "reasonableness" a different claim decided by the state court of appeal.[5] By reviewing part of the state appellate court ruling and by ignoring the state supreme court's rejection of the second habeas petition, the circuit court made clear that it was not reviewing the state high court's rejection of Valdovinos's expanded and revised *Brady* claim.

It is unclear exactly why the circuit court did not review the California Supreme Court's rejection of the *Brady* claim. The circuit court wrote, "In the

---

[5] The Ninth Circuit concluded that the state appellate court reasonably rejected Valdovinos's claim that the prosecution's belated disclosure of the discovery of the gun and drugs in Lopez's bedroom unconstitutionally compromised the defense's cross-examination of Lopez at the preliminary hearing. App. 19a-20a.

event that the state court issues a summary denial of the habeas petition, the district court conducts an independent review of the record. *Richter* v. *Hickman*, 578 F.3d 944, 952 (9th Cir. 2009) (en banc)." The circuit court did not explain whether or to what extent "independent review" includes deferential review, and the cited page in the Ninth Circuit's decision in *Richter* is unclear on that point as well. If the circuit court was implying by its use of the term "independent review" that the state supreme court's decision deserved no deference because it was a summary denial, the question this Court ordered the parties to address in *Richter* plainly throws into doubt the circuit court's ruling.

As suggested elsewhere in its opinion, the circuit court may have assumed, erroneously, that Valdovinos did not present his finally revised *Brady* claim to the state high court. Without mentioning the state supreme court's summary denial of Valdovinos's second state habeas petition, the court of appeals offered a reason for not deferring to the ruling of the intermediate state court of appeal on direct review. The Ninth Circuit explained, "The California court did not have cause to consider the cumulative *Brady* impact because it had before it only the *Brady* claim based on the undisclosed [*sic*] photo lineups." App. 20a. This explanation must refer to the intermediate state appellate court, because that court alone "had before it only the *Brady* claim based on the undisclosed [*sic*] photo lineups." App. 20a.

To the extent the Ninth Circuit concluded that the state courts had reviewed only part of Valdovinos's *Brady* claim, it was simply wrong. The California Supreme Court considered the revised and expanded claim when it summarily denied Valdovinos's second habeas corpus petition. In that

petition, Valdovinos claimed, "The prosecution violated Brady . . . by not disclosing evidence of the gun, Lopez's favorable treatment, the pictures of others dressed like Valdovinos, photographic lineups, and the letter describing the killing as a contract killing." App. 120a; see also App. 113a (petition's contention number 12 that "[t]hese newly discovered additional materials strengthen the claims Valdovinos has previously made in this Court. . . ."). The California Supreme Court necessarily rejected the revised *Brady* claim, including the assertion of cumulative prejudice, when it denied the petition.

The state supreme court's summary denial of Valdovinos's revised *Brady* claim was a rejection of the claim on its merits. *Griffey* v. *Lindsay*, 345 F.3d 1058, 1068, vacated as moot, 349 F.3d 1156 (9th Cir. 2003); *Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); see *In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993). As a denial of the claim on the merits, the state supreme court's decision required a federal habeas court to affirm it unless the decision was unreasonable. See *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007). The state supreme court's denial of the *Brady* claim deserved particular deference under section 2254(d) because the *Brady* rule is a general one, requiring an assessment of "materiality" in light of all the circumstances. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). Thus, by erroneously failing to review the California Supreme Court's rejection of the revised *Brady* claim at all, the Ninth Circuit necessarily erred in failing to review that decision deferentially.

B. Under Deferential Review, the Court of Appeals Would Be Compelled to Reject the *Brady* Claim.

Proper application of section 2254(d)'s deferential review standard to the *Brady* claim would compel denial of the writ. The state record reasonably supported (and indeed compelled) a conclusion that no *Brady* violation occurred.

In deciding that "the cumulative effect of the suppressed evidence denied Valdovinos a fair trial" (App. 22a), the court of appeals erred not only by applying *de novo* review but by inflating the impact of four items of evidence: the Mongia photograph (App. 16a-18a, 21a), the anonymous letter proposing the Balemas drug-debt story (App. 18a-19a), the photographic lineups (App. 21a-22a), and the gun and drugs found in Lopez's bedroom (App. 19a-20a). The court also erred by unaccountably ignoring powerful evidence pointing to Valdovinos as the actual killer. Whether assessed individually or cumulatively, the belated disclosures and alleged nondisclosures had no effect. Certainly, the state supreme court could reasonably have so concluded.

1. The Mongia Photograph

The Ninth Circuit found the Mongia photograph significant because "[v]arious inconsistencies existed between the witnesses' testimony about the shooter's appearance" and because "[t]he photograph has the potential to undermine the significance of the single commonality of these descriptions—the cowboy hat—that the court identified as one of the stand-out characteristics of the shooter." App. 17a.

The court erred by ignoring the fact that trial counsel's declaration in the federal habeas traverse

did not mention the Mongia photograph. Pp. 73a; ER 157. The court thereby overlooked Valdovinos's omission of a critical part of any *Brady* claim—namely, that the evidence be suppressed by the state. Valdovinos never established that the prosecution failed to disclose the Mongia photograph or that defense counsel at the time of trial was unaware of Mongia's involvement in the case.

The court of appeals' assessment of the photo also ignored the undisputed evidence that (1) the shooter was not the only person wearing a cowboy hat at the scene, and (2) none of the three persons who identified Valdovinos as the shooter did so *because* he wore a cowboy hat. The three identified him as the shooter when he was *not* wearing a cowboy hat, at the preliminary examination and at trial, despite the fact that he *was* wearing one at the nightclub. Thus, regardless of whether a cowboy hat was a "stand-out characteristic[] of the shooter," that characteristic had no significant effect on any of the eyewitness identifications. Likewise, the Mongia photo suggested nothing new about the reliability of those identifications.

Mongia's photograph was unimportant for another reason: all the evidence showed that the shooter immediately fled the crime scene in a car, yet Mongia remained available to the police for an interview. Therefore, he could not have been the killer. And because Mongia was not the killer, it made no difference that he was dressed like him, given the undisputed evidence at trial that several persons at the club were dressed like the shooter. Since the Mongia photograph only confirmed what everyone already knew—that several persons were dressed like the shooter—it had no value to the defense.

As the district court noted (App. 74a), no admissible evidence showed that Mongia even witnessed the shooting. Thus, there is no reason to believe that Mongia had any useful information to provide. The Ninth Circuit ignored this factor as well as all those showing that Mongia's appearance was immaterial.

2. The Anonymous Letter

The court of appeals wrote, "Given the conflicting identification testimony and a letter pointing to another culprit, the non-disclosure of the letter denied the defense important investigative opportunities that had the potential to lead to admissible evidence." App. 19a. The court's conclusion is inexplicable and unsustainable, particularly under deferential review of the state court adjudication for simple reasonableness.

Because the letter writer said he was not the shooter, the letter "point[ed] to *another* culprit" (emphasis added)—i.e., not Valdovinos—only if Valdovinos himself was the writer or Valdovinos directed the letter to be written in his name. In either of those cases, Valdovinos knew of the letter, so its nondisclosure could not have violated *Brady*. *Rhoades* v. *Henry*, 596 F.3d 1170, 1181 (9th Cir. 2010) (no *Brady* violation when a defendant possessed the information he claims was withheld); *Ward* v. *Hall*, 592 F.3d 1144, 1183 (11th Cir. 2010) (government has not suppressed evidence in violation of *Brady* if the defendant knew of the information or had equal access to it); *United States* v. *Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009) (no violation of *Brady* in government's failure to provide transcript that was as available to the defendant as to the government); *United States* v. *Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (no *Brady* violation where the

exculpatory information was not only available to the defendant but was in a source where a reasonable defendant would have looked). Since the record reasonably permitted the conclusion that Valdovinos knew of the letter, the state supreme court did not act unreasonably in finding it not to be *Brady* material.

In any event, the court of appeals never identified the "important investigative opportunities" the defense lost as a result of nondisclosure of the letter. In his declaration, trial counsel said he was unaware of the letter but did not say he was unaware of the information in it: the Balemas drug-hit story. Speculative inferences as to what counsel might have discovered had evidence been disclosed do not establish materiality under *Brady*. *Wood* v. *Bartholomew*, 516 U.S. 1, 5-6 (1995). The opinion of the court of appeals does not offer even that level of speculative inference.[6]

3. The Photographic Lineups

The Ninth Circuit wrote: "Significantly, both the state court and the district court's findings of no prejudice relied heavily on the 'strong' eyewitness

---

[6] Instead of identifying the investigative opportunities the defense lost, the circuit court remarked that "only law enforcement officials are in a position to authenticate the letter, to say how and when the letter came to be in the file—a task that might have been possible had the prosecution disclosed the letter when it was received." App. 19a. This statement rests on the unwarranted assumption that the authorities had the letter before trial, and it ignores the fact that associate habeas counsel made no effort to learn when the letter came into the state's possession. The police cannot be faulted for failing to authenticate what they were never asked to authenticate.

testimony." App. 21a. Disagreeing with those purported findings, the court of appeals stated:

> But the eyewitness testimony was contradictory about the shooter's physical appearance, his size, build, and what he was wearing. The photo lineup evidence rendered the identifications questionable. Castro identified Valdovinos as the shooter at the preliminary hearing, but she picked a person other than Valdovinos in both lineups. Diaz also identified Valdovinos at the preliminary hearing, but could not identify him from the photo lineups with any degree of certainty. And Valdovinos was the only person included in both photo lineups, despite the fact that Lopez, who also was present at the nightclub that night, was similar in build and stature to Valdovinos.

App. 21a-22a.

This passage contains several errors. First and foremost, the circuit court misunderstood the issue.

For purposes of determining materiality of the photographic lineup evidence, the issue was not, as the court of appeals assumed, the extent to which the evidence of the lineups affected the probative value of the eyewitness identifications. That might have been the question if the lineup evidence had not been disclosed at trial. But it *was* disclosed at trial. The court of appeals mistakenly evaluated this belatedly disclosed evidence as if it had never been disclosed.

Under AEDPA's deferential standard of review, the proper question is whether the state supreme court could reasonably find that the jury would not have considered the case more favorably to the defense if the prosecution had disclosed the photo lineups earlier than at trial. The state court clearly could have so found. The parties at trial treated the

evidence just as they would have if the evidence had been timely disclosed, as the state appellate court (App. 101a-02a) and the district court (App. 68a-69a) recognized. Defense counsel argued to the jury that the misidentifications by Castro undermined her identification of Valdovinos at trial and that Diaz's tentative identifications were unreliable. See App. 68a-69a, 101a-02a. Indeed, the belated disclosure may actually have helped Valdovinos because it gave the defense the benefit of the trial court's instruction to the jury that the prosecution had unjustifiably concealed and/or failed to timely disclose the photo lineups. Defense counsel took full advantage of the prosecution's misstep and the instruction, excoriating the police in closing argument for their misbehavior. App. 101a-02a. All these factors not only permit but compel the conclusion that the belated disclosure of the photo lineups was immaterial.

The court of appeals ignored the fact that the defense fully exploited both the lineup evidence itself and its belated disclosure. Even if the evidence did "render the identifications questionable" (a dubious assumption discussed below), the jury took that factor into consideration. The jury convicted Valdovinos not by accepting at face value purportedly "questionable" identifications but by crediting the evidence that overcame whatever weakness existed in those identifications.

Second, the court of appeals suggested in the quoted extract that Diaz's uncertain identification of Valdovinos in both lineups tended to undermine Diaz's identification of him at the preliminary hearing and the trial. The state supreme court could reasonably have concluded differently. Viewing the first photo lineup, Diaz said it was difficult for him to be certain because the shooter was wearing a hat, unlike the persons in the lineup. The persons in the

second lineup were hatless, too. Moreover, Valdovinos's appearance changed significantly from one lineup to the other. App. 56a; RT 628 (prosecutor's unrebutted argument to the jury that Valdovinos "looks quite a bit different from one photograph to another"), RT 641-42 (prosecutor's unrebutted closing argument that defendant's appearance changed from photo to photo and at trial). The foregoing factors support the view that Diaz's cautious identification of Valdovinos in both photo lineups enhanced rather than detracted from the reliability of Diaz's identifications of Valdovinos in court. Again, the conclusion need not be compelled for it to be sustainable as reasonable under the AEDPA.

Finally, the court of appeals implied that the lineups were unduly suggestive because Valdovinos was the only person in both (App. 55a), whereas Lopez, who resembled him in build and stature (App. 32a, 90a), was in neither. Again, the state supreme court could reasonably have found to the contrary. The presence of Valdovinos in both lineups made no difference because he looked very different in each lineup. See App. 56a, 88a. Lopez's resemblance to Valdovinos in build and stature made no difference because the photographs in the lineup showed faces, not body types. Moreover, a detective denied without contradiction that Valdovinos and Lopez looked similar (ER 466), and the jury presumably weighed that testimony by comparing the lineup photographs to the photograph of Lopez that was placed into evidence. RT 549, 560. Tellingly, defense counsel did not argue to the jury that his client resembled Lopez, nor did counsel suggest that Diaz's identifications from the lineups might not have occurred if Lopez had been included in one or both. Particularly under the appropriately deferential

standard of review, the record does not permit the conclusion that the photo lineups unfairly pointed toward Valdovinos and away from Lopez.

4. The Gun and Drugs in Lopez's Bedroom

The court of appeals erroneously concluded: "The failure to disclose the gun and drugs found in Lopez's possession, even if not prejudicial on its own, only further solidifies our finding of collective prejudice." App. 22a. As with the photographic lineup evidence, the circuit court appears to have considered the belated disclosure of the evidence at trial as if the evidence was never disclosed. Apart from that error, the court erred by not explaining how Lopez's possession of a handgun and methamphetamine in his bedroom "solidifie[d]" prejudice to the defense. Since the jury knew everything about the discovery of the contraband, the belated disclosure made no difference. Elsewhere in its opinion, the court found reasonable the state appellate court's finding that the belated disclosure did *not* significantly affect the defense's opportunity to cross-examine Lopez at the preliminary hearing. App. 20a. By affirming an explanation of how the belated disclosure of the discovery of the gun and drugs did not prejudice the defense, the circuit court made particularly telling its failure to explain how that belated disclosure did add prejudice.

The whole is not always greater than the sum of its parts, particularly when the value of each part is zero. The court's unelaborated finding of additional prejudice with respect to Lopez's gun and drugs cannot be sustained under a deferential standard of review.

5. Evidence Ignored by the Ninth Circuit

The circuit court unaccountably failed to consider the evidence corroborating the eyewitness identifications. The state high court reasonably did consider that corroboration. Two witnesses, Lopez and Garcia, placed Valdovinos at the nightclub at the time of the shooting. App. 86a. There was no evidence to the contrary. The car in which the killer left the scene looked like Valdovinos's car, which the police found in Oregon shortly before Valdovinos was arrested there. The defense never disputed that Valdovinos's car resembled the getaway car and never sought to explain either Valdovinos's flight to Oregon or the car's missing license plates. The jury could not reasonably have failed to infer that Valdovinos fled the crime scene for Oregon in the same car the shooter used and then tried to conceal his flight by removing the car's license plates. Moreover, the defense never attempted to explain why Valdovinos fled the state so quickly that he left behind his paycheck in San Jose. Plainly, the urgency of his flight and the thousands of dollars he possessed in Oregon made his paycheck and job in San Jose expendable. If, as the anonymous letter suggested, the murder was indeed a contract killing, Valdovinos acted exactly like the hired gun who did it.

By contrast, Lopez remained easily accessible to the police at the home he shared with Valdovinos until the latter's sudden flight from the state. Lopez retained his own personal gun and drugs in his bedroom after the killing, obviously unconcerned that they might be thought to link him to the killing or

that he might be a suspect.[7] No thousands in cash, abandoned paycheck, or missing car tied him to the crime. Given this evidence, the jury had little reason to wonder why Lopez disappeared before trial after he incriminated Valdovinos in his statements to the police and then retreated from those statements at the preliminary examination: Lopez was afraid of the killer or, at a minimum, was trying to protect him. App. 96a. There was no reasonable doubt who that killer was, as the district court concluded. App. 75a ("Even together, the exculpatory evidence fails to raise a doubt about the outcome of the trial."). The circuit court could find otherwise only by ignoring all the evidence pointing to Valdovinos and away from Lopez.

In contrast to the careful evaluation of materiality required for *Brady* claims, see *Kyles* v. *Whitley*, 514 U.S. 419, 441-54 (1995), the court of appeals resorted to conclusory assertions belied by the record. The circuit court's unsupportable analysis compounded the court's erroneous adoption of a *de novo* standard of review. Resolution of *Harrington* v. *Richter* in favor of deferential AEDPA review would require the court of appeals to reconsider this case and deny the writ.

---

[7] Once the state showed that Lopez's gun was not the murder weapon, Valdovinos offered the unauthenticated Ledezma statement in an attempt, via double hearsay, to place the murder weapon with Lopez. The defense's belated production of blatantly inadmissible evidence purporting to implicate Lopez only further showed how clearly the evidence at trial failed to implicate him.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 19, 2010

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General

JERFMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

SF2008401355
20310217.doc

Supreme Court, U.S.
FILED
COPY
JUL 20 2010
OFFICE OF THE CLERK

No. 10-136

In the Supreme Court of the United States

ROBERT HOREL, WARDEN, *Petitioner,*

v.

FELIX SOLORIO VALDOVINOS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Jeremy.Friedlander@doj.ca.gov
Counsel for Petitioner

INDEX TO APPENDIX

Page

Published Opinion by Ninth Circuit Court of Appeals, filed March 10, 2010 ..... 1a

Order Denying Petition for Writ of Habeas Corpus by United States District Court for the Northern District of California, filed March 12, 2008 ..... 26a

Order Denying Petition for Writ of Habeas Corpus by California Supreme Court, filed December 19, 2001 ..... 80a

Order Denying Petition for Writ of Habeas Corpus by California Supreme Court, filed July 26, 2006 ..... 81a

Opinion by Court of Appeal of the State of California, Sixth Appellate District, filed August 23, 2000 ..... 82a

Order Denying Petition for Panel Rehearing by Ninth Circuit Court of Appeals, filed April 26, 2010 ..... 106a

Valdovinos's Second State Habeas Petition and Table of Contents from Supporting Points and Authorities 108a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELIX SOLORIO VALDOVINOS,
Petitioner-Appellant,

v.

JOE MCGRATH,
Respondent-Appellee.

No. 08-15918

D.C. No.
4:02-CV-01704-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
September 1, 2009—San Francisco, California

Filed March 10, 2010

Before: Betty B. Fletcher and Andrew J. Kleinfeld, Circuit Judges, and Kevin Thomas Duffy,* District Judge.

Opinion by Judge B. Fletcher

---

*The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

COUNSEL

Christopher J. Cannon, Sugarman & Cannon, San Francisco, California, for the petitioner-appellant.

Edmund G. Brown, Jr., Dane R. Gillette, Gerald A. Engler, Peggy S. Ruffra, and Jeremy Friedlander, San Francisco, California, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge:

Petitioner-Appellant Felix Solorio Valdovinos appeals from the district court's denial of his amended habeas corpus petition challenging his jury conviction of first degree murder. He contends that the government withheld potentially exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that his trial counsel's performance fell below the level required under *Strickland v. Washington*, 466 U.S. 668 (1984). Because a reasonable probability exists that the undisclosed *Brady* material could have altered the result of the proceeding, we reverse in part and remand with instructions to the district court to issue a writ of habeas corpus.

I.

On December 1, 1998, a jury convicted Valdovinos of the first degree murder of Nelson Caballero. On May 11, 1998, Caballero was shot outside a San Jose nightclub. The shooter fired two shots from a .380 caliber semi-automatic handgun, hitting Caballero once in the stomach and once in the head. The murder investigation ultimately led to the arrest of Valdovinos in Oregon in June 1998.

At trial, the prosecution relied heavily on eyewitness testimony implicating Valdovinos in the killing. The prosecution called as eyewitnesses four of Caballero's acquaintances who were present at the shooting. Three of these witnesses identified Valdovinos as the shooter at both the preliminary hearing and trial.

One witness, Joaquin Diaz, testified that the shooter wore a black cowboy hat and a black leather jacket, and had a mustache. Diaz stated that the gunman was approximately the same height as Diaz, who stood five feet, six inches. Diaz also testified that one of the shooter's companions wore cowboy garb and a hat, but was taller than Diaz, and that a third man talking to Caballero at the time of the shooting did not wear any cowboy apparel and was Diaz's height.

Tracy Castro and Kyong "Say" Miranda also witnessed the shooting outside the club. At trial, Castro testified that, as she exited the club that night, she observed a man wearing a white cowboy hat, jeans, and a black waist-length jacket shoot Caballero in the stomach and then in the temple. Castro also testified that the shooter was six feet tall. After the shooting, Castro saw the shooter leave with another person in a gray car.

Miranda testified at trial that the shooter was a Hispanic male wearing a light tan straw cowboy hat, a short leather jacket, and jeans. She said he was tall and slender and had a mustache, and that he drove away in a gray car with a male passenger.

Caballero's girlfriend, Blanca Torres, told the police the shooter wore a black hat, a dark jacket, was a bit muscular, and had a mustache.

Diaz, Castro, and Miranda all identified Valdovinos as the shooter at both the preliminary

hearing and trial. Torres could not identify the shooter.

During the course of the investigation, Detective Ernesto Alcantar presented two of the eyewitnesses each with two photographic lineups. A few days after the shooting, Detective Alcantar showed Castro and Diaz each a photo lineup of six Hispanic males with mustaches and short to medium black hair. At that time, Castro did not identify Valdovinos but selected another photograph. Diaz chose the photo of Valdovinos but said he was not certain of the identification.

Several months later, in advance of the preliminary hearing, Detective Alcantar showed Castro and Diaz each a second photographic lineup using a different photograph of Valdovinos. Again, Diaz chose Valdovinos's photo but said he was not sure and Castro identified someone other than Valdovinos.

At the preliminary hearing, Valdovinos's defense attorney, in the presence of the prosecutor and Detective Alcantar, requested a blackboard preliminary hearing, in which a screen prevents the witnesses from seeing the defendant. [1] Defense counsel made the request based on a review of police reports indicating the witnesses had never seen a lineup or photo lineup. Neither the prosecutor nor Detective Alcantar informed the court or defense counsel that the witnesses already had seen photo lineups including Valdovinos's photo, or that Diaz

---

[1] A blackboard preliminary hearing takes place when the witnesses have not made any prior identifications of the defendant. A screen blocks the witness's view of the defendant so that when the witness later is asked to make an identification at trial, the witness will not already have seen the defendant at the preliminary hearing.

tentatively had identified Valdovinos's photo whereas Castro had chosen different photographs. The court denied the defense attorney's request.

Defense counsel did not learn of the photo lineups until cross-examination of Diaz during trial. Detective Alcantar later testified he had administered two separate photo lineups.

Upon learning of the non-disclosure of the previous photographic lineups, defense counsel moved for a dismissal. The trial court determined that the non-disclosure of the photo lineups fell within the purview of *Brady v. Maryland*, 373 U.S. 83 (1963). However, the court denied the motion to dismiss because it found that the prosecution did not intentionally conceal the exculpatory evidence and therefore did not act in bad faith. The court read a corrective jury instruction and offered defense counsel a continuance, which counsel did not take.

Also at trial, the prosecution read into the record the preliminary hearing testimony of Aurelio Lopez and his unsworn statement to the police. Lopez and another man, Isidro Garcia, both of whom resided with Valdovinos, were at the club on the night of the shooting. Lopez was scheduled to testify for the prosecution at trial, but could not be located once the trial started. Defense counsel objected to the court declaring Lopez unavailable and permitting the introduction of his preliminary hearing testimony, but did not object to the admission of Lopez's out-of-court statement.

As part of the investigation, Detective Alcantar and Police Sergeant Pete Ramirez visited Valdovinos's apartment. Valdovinos was not home, but Lopez and Garcia were present. The police received consent to search the apartment and found an ounce of methamphetamine and a nine millimeter gun in Lopez's bedroom. They arrested Lopez on an

outstanding warrant for drug and gun possession. Police never brought new gun and drug possession charges against Lopez.

The same day, the detectives interviewed Lopez and Garcia at the police station. When they asked Lopez if he had seen Valdovinos with a weapon on the night of the shooting, Lopez said he did but did not know what kind. When questioned further, Lopez stated that the weapon was a gun. Lopez later contradicted this statement while testifying at the preliminary hearing.

At trial, Garcia testified that many people at the nightclub on the night of the shooting were dressed similarly, and that both Valdovinos and Lopez wore hats and black jackets. Garcia was wearing a black leather jacket, black pants, and boots, but no hat. Garcia testified that he and Lopez were exiting the club when Caballero was shot. Garcia said he had heard two shots and had seen Caballero on the ground.

At the preliminary hearing, Lopez admitted that he told Detective Alcantar that he had seen Valdovinos with a gun, but testified that his statements to Detective Alcantar were not truthful. Lopez explained that he was afraid that he himself might be a suspect and told Detective Alcantar what he wanted to hear. Detective Alcantar did not include a photograph of Lopez in either lineup, but testified at trial that Lopez was similar in size and stature to Valdovinos.

At trial, Detective Alcantar testified that Sergeant Ramirez had found methamphetamine and a gun in Lopez's bedroom when police arrested Lopez. This testimony was the first time defense counsel had heard of the methamphetamine and gun found in Lopez's bedroom.

Again, based on the untimely disclosure of favorable evidence, Valdovinos's defense counsel moved for a mistrial, arguing that Lopez's possession of the gun and drugs could have been used to impeach his testimony at the preliminary hearing and that, without this evidence, counsel had been unable to cross-examine Lopez effectively at the preliminary hearing. The court denied the request for a mistrial, finding that the prejudicial impact of the untimely disclosure did not warrant a mistrial. The jury convicted Valdovinos at the close of the seven-day trial.

A state appellate court affirmed the judgment on August 23, 2000. Valdovinos filed a pro se petition for a writ of habeas corpus in the California Supreme Court on June 29, 2001, which the state Supreme Court denied on December 19, 2001. Valdovinos's pro se federal habeas corpus petition followed on April 10, 2002.

The district court appointed habeas counsel for Valdovinos. After a review of the prosecution's case file yielded additional undisclosed evidence, Valdovinos's habeas counsel amended the habeas petition to include this new evidence. In a traverse accompanying the amended petition, counsel pointed to four types of newly discovered evidence.

First, the prosecutor's case file contained an undisclosed anonymous letter purportedly sent to Caballero's family stating that Caballero's murder was a contract killing over a debt. Second, habeas counsel obtained a written statement from a man named Juan Ledezma stating that Lopez had told Ledezma that Lopez had two guns of different calibers, Lopez had killed someone at a bar in San Jose and blamed Valdovinos, and Lopez had told his brother to throw out the gun used in the killing. The third piece of newly discovered evidence was a

photograph from the police file taken by police on the night of the shooting. The man in the photo, identified as Jose Mongia, is wearing a black hat and black leather jacket in the photo — the same items eyewitnesses testified the shooter wore. Habeas counsel also included in the amended petition additional information regarding the gun and drugs found in Lopez's possession during the apartment search in 1998.

The district court found the new evidence rendered Valdovinos's claims unexhausted and ordered a stay on December 3, 2004, to allow Valdovinos to exhaust his remedies in state court. Nine months later, on September 9, 2005, Valdovinos filed his second state habeas petition, this time containing the previously unexhausted claims. The Supreme Court denied this petition on July 26, 2006. On August 23, 2006, the district court ordered Valdovinos to file a motion to amend the stayed petition within two weeks. Valdovinos filed his motion to amend three weeks later, on September 14, 2006.

The district court denied relief on March 12, 2008, and certified two issues for appeal: (1) whether the *Brady* violations denied Valdovinos due process; and (2) whether Valdovinos's trial counsel provided ineffective assistance by failing to object to the prosecution's introduction of Lopez's out-of-court statements.[2] In addition, the state appeals the district court's decision to allow Valdovinos to amend his habeas petition.[3] We have jurisdiction under 28 U.S.C. § 2253.

---

[2] Valdovinos raises an uncertified issue in his opening brief. We decline to expand the scope of the COA to include the uncertified issue.

[3] The state is not required to obtain a COA before (continued...)

II.

We first determine whether the district court erred in staying Valdovinos's petition while he exhausted additional claims in state court and allowing Valdovinos to amend his habeas petition. We review for abuse of discretion a district court's stay and abeyance of a mixed petition containing both exhausted and unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 279 (2005). We also review for abuse of discretion a district court's decision to allow a habeas petitioner to amend his petition. *Hebner v. McGrath*, 543 F.3d 1133, 1136 (9th Cir. 2008). We find the district court did not abuse its discretion in granting the stay or allowing the amendment.

A.

The district court ordered a stay on December 3, 2004, to permit Valdovinos to exhaust his remedies in state court. Nine months later, on September 9, 2005, Valdovinos filed a second state habeas petition containing the unexhausted claims with the California Supreme Court. The state Supreme Court denied this petition on July 26, 2006 and, on August 23, 2006, the district court ordered Valdovinos to file a motion to amend the stayed petition within two weeks. Valdovinos filed his motion to amend on September 14, 2006.

The state opposed the motion to amend, arguing that Valdovinos did not act within a reasonable time to exhaust his state remedies because he did not file his second state habeas petition until nine months after the district court entered the stay. The district

---

(...continued)
raising an issue on appeal. Fed. R. App. P. 22(b)(3).

court rejected this argument, finding that the delay provided insufficient grounds upon which to deny Valdovinos's motion to amend the petition.

[1] In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court examined the manner in which courts should treat mixed petitions containing both exhausted and unexhausted claims in light of the Antiterrorism and Effective Death Penalty Act's ("AEDPA") one-year time limit on the filing of federal habeas corpus petitions. The Supreme Court held that a district court has discretion to grant a stay and abeyance of a mixed petition so that a petitioner may exhaust the unexhausted claims in state court before returning to federal court for review of a "perfected petition." *Id.* at 278. *Rhines* struck a balance between the congressional intent behind AEDPA — to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," *id.* at 276 (citations omitted) — and the preservation of petitioners' rights to federal review of their claims. *Id.* at 277.

Rhines opined that a district court would likely abuse its discretion in denying such a stay where "the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory tactics." *Id.* at 278. Although *Rhines* directed district courts to "place reasonable time limits on a petitioner's trip to state court and back," *id.* at 278, the Court left the determination of that time limit to the discretion of the district court.

[2] Here, the district court did not abuse its discretion in finding Valdovinos satisfied the elements of *Rhines*. First, the Supreme Court decided *Rhines* after the district court here issued the stay without imposing a specific time limit within which

Valdovinos had to file his petition in state court. The district court reasoned that retroactively imposing a time limit would have been inappropriate and emphasized that Valdovinos had not engaged in dilatory tactics and had no motivation for delay, as he is not a capital defendant. The court also noted that Valdovinos did not bear the blame for omitting the additional evidence rendering his claims unexhausted because he had no knowledge of it due to the misconduct of the prosecution. We agree. Thus, we hold that the district court did not abuse its discretion in allowing the amendments to the original habeas petition.

B.

We next must determine if the amendments arise "from the same core facts as the timely filed claim" such that they relate back to the original, timely petition. *Mayle v. Felix*, 545 U.S. 644, 657 (2005). Following the Supreme Court's test in *Mayle*, we hold that the new evidence in the amended habeas petition properly relates back to the claims raised in the initial petition.

[3] Federal Rule of Civil Procedure 15(c) governs amendments to pleadings in habeas proceedings, which are characterized as civil in nature. 28 U.S.C. § 2242. Rule 15(c) instructs: "An amendment of a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading." Fed. Rule Civ. P. 15(c). In *Mayle*, the Supreme Court held that "claims added by amendment [must] arise from the same core facts as the timely filed claims," and must not be "separate in both time and type from the originally raised episodes." *Mayle*, 545 U.S. at

657 (quotation and citation omitted). Thus, we review the district court's finding that the new claims related back under the *Mayle* standard.

1.

We first examine Valdovinos's *Brady* claims. The original petition alleged that Valdovinos was denied due process and a fair trial by the prosecution's withholding of the prior photo lineups, evidence of the drugs and gun found in Lopez's possession, and the favorable treatment Lopez received for his testimony. The amendments seek to add that the prosecutor violated *Brady* by not disclosing the anonymous letter and the Mongia photograph.

The district court held that Valdovinos's revised *Brady* claim related back to the *Brady* claim in the original petition. We agree.

This case is similar to *Mandacina v. United States*, 328 F.3d 995 (8th Cir. 2003), which the *Mayle* court cited with approval. *Mayle*, 545 U.S. at 664, n.7. In *Mandacina*, the original petition alleged that the government had failed to disclose exculpatory evidence. *Mandacina*, 328 F.3d at 1000. The petitioner sought to amend his habeas petition to include the "Borland Report," to which the original petition made no reference. *Id.* The Eighth Circuit concluded that the amended claim related back to the original petition because the content of the report was "evidence of other suspects obtained by" the police department during the murder investigation. *Id.* at 1001.

[4] Here, both the original and amended claims pertain to suppressed exculpatory evidence originating from materials from the police investigation. Each claim, therefore, is of the same type — exculpatory information the government had

in its file — that the government failed to disclose at the required time. As in *Mandacina*, "[t]he *Brady* claims in the original [petition] . . . satisfy Rule 15(c) by providing the government with the notice that the statutes of limitation were intended to provide." *Id.* Therefore, we hold that the district court did not abuse its discretion in permitting the amendments to the *Brady* claims.

2.

[5] We next examine Valdovinos's ineffective assistance of counsel claim. The original petition alleged ineffective assistance of counsel; the amended petition seeks to add new evidence supporting the claim. The claim has not changed, but habeas counsel argues the four pieces of newly discovered evidence "provide a more concrete basis for demonstrating prejudice" under *Strickland v. Washington*, 466 U.S. 668 (1984). The four new pieces of evidence are: (1) the photograph of Mongia; (2) the statement by Ledezma implicating Lopez; (3) the anonymous letter; and (4) police documents concerning the drugs and gun found in Lopez's possession.

[6] The district court found that the amended claim arose from the same conduct, transaction, or occurrence as set forth in the original pleading, and that the government had received notice of the claim in the original pleading. The original ineffective assistance of counsel claim alleged counsel did not adequately investigate suppressed exculpatory evidence upon learning of it. The amended petition simply adds more evidence that counsel did not uncover in its original investigation. The original petition provided notice of this claim, as the district court found. Therefore, the district court did not abuse its discretion in permitting amendment of the original habeas petition to add newly discovered

evidence supporting both the *Brady* and the ineffective assistance of counsel claim.

III.

In accordance with the standard set forth in AEDPA, a court may grant a writ of habeas corpus only if the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). Habeas relief is warranted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quotations and citations omitted).

In the event that the state court issues a summary denial of the habeas petition, the district court conducts an independent review of the record. *Richter v. Hickman*, 578 F.3d 944, 952 (9th Cir. 2009) (en banc). This court reviews de novo the district court's denial of habeas relief. *Id.*

A.

[7] We turn now to the substance of Valdovinos's *Brady* claim. As the Supreme Court recently articulated, "[a]lthough the State is obliged to 'prosecute with earnestness and vigor,' it 'is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *Cone v. Bell*, ___ U.S. ___, 129 S. Ct. 1769, 1782 (2009) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The Court has long held that the suppression of evidence favorable to an accused violates due process of law, regardless of whether the prosecution suppresses the evidence in good or bad faith. *Brady*, 373 U.S. at 87. As the Supreme Court explained in *Brady*, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* Thus, "when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment." *Cone*, 129 S. Ct. at 1782 (citing *Brady*, 373 U.S. at 87).

[8] A *Brady* claim is composed of three necessary elements: "(1) [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) that evidence must have been suppressed by the State, and (3) prejudice must have ensued." *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008) (quotations and citation omitted). "To determine whether prejudice exists, we look to the materiality of the suppressed evidence." *Id.* "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been

disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783; *United States v. Jernigan*, 492 F.3d 1050, 1053-54 (9th Cir. 2007) (en banc). In other words, a defendant need not show that he "would more likely than not have received a different verdict with the evidence." *Jernigan*, 492 F.3d at 1054 (quotation and citation omitted). Instead, he must show only that "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* (quotation and citation omitted). A court must consider the materiality of the *Brady* violations collectively rather than item by item. *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995).

The four new pieces of evidence are: (1) the photograph of Mongia; (2) the anonymous letter; (3) police documents concerning the drugs and gun found in Lopez's possession; and (4) the Ledezma statement implicating Lopez. The last piece of evidence, however, is not *Brady* material because it was obtained by Valdovinos's habeas counsel and never was part of the prosecution's file.

1.

Valdovinos's habeas counsel stated in a declaration in support of the amended petition that the prosecution's file contained photographs of several of the witnesses police interviewed at the nightclub on the night of the shooting. One such photo shows a man named Jose Mongia wearing a black cowboy hat and a black leather jacket, the same items allegedly worn by the shooter.

Valdovinos argues that the prosecution's failure to disclose the Mongia photograph was material because the state court found that Valdovinos was the only one at the crime scene consistently described

as wearing a cowboy hat. The district court rejected Valdovinos's *Brady* claim as to the Mongia photo because any evidence indicating the authenticity of the photograph is lacking and therefore the court could not conclude the photograph would have affected the trial in any way. The state contends that the non-disclosure was not material because Mongia cannot be the shooter because several witnesses stated the shooter fled the scene of the crime; Mongia did not flee since he was available for questioning.

[9] In conducting its *Brady* analysis, the district court ignored the possibility that the disclosure of the photo could have added uncertainty to the identifications of Valdovinos as the shooter. Various inconsistencies existed between the witnesses' testimony about the shooter's appearance: one witness testified the shooter wore a black cowboy hat and a black leather jacket, stood five-and-a-half feet tall, and had a mustache; another testified that the shooter wore a white cowboy hat, a black leather jacket, and was six feet tall, and initially insisted the shooter had no facial hair; a third witness testified that the shooter wore a light tan straw hat, a black leather jacket, and stood over six feet; and a fourth witness hesitantly described the shooter as wearing a black hat and black leather jacket. These inconsistencies bolster a finding of materiality with regard to the Mongia photo. The photograph has the potential to undermine the significance of the single commonality of these descriptions — the cowboy hat — that the court identified as one of the stand-out characteristics of the shooter. The fact that many people at the scene that night actually shared this characteristic, including Mongia, tends to "undermine[ ] confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (quotation and citation omitted). Furthermore, had the prosecution fulfilled

its obligations under *Brady* and turned this photograph over in a timely manner, the defense could have elicited testimony from the police to authenticate it.

2.

The second piece of evidence added in the amended petition is an anonymous letter addressed to Eulalio Caballero found in the prosecution's file. The letter suggests that Nelson Caballero owed a debt to someone named Ramon Balemos, and that Balemos paid someone with money and drugs to kill Caballero. Valdovinos's trial attorney stated in a declaration that he had never seen the letter.

The district court found that the letter qualified as *Brady* material, but rejected the claim because its disclosure did not raise any doubt about the verdict, given that the letter was ambiguous and anonymous and thus inadmiss[i]ble. The district court further concluded the letter would not have led to any admissible exculpatory evidence.

Valdovinos puts forth several arguments tending to show the letter's materiality. First, he argues that the prosecution's non-disclosure prevented the defense from conducting a proper investigation, and there is no way to know whether the trial could have been affected by the results of that investigation. Valdovinos next argues that the letter impeached the testimony of Detective Alcantar, who testified that there was no evidence in the case indicating that the murder was drug related. Defense counsel argued during closing arguments that Caballero was a drug dealer and that Lopez was a known drug user, and that drugs could have been the motive for the crime. In addition, police found a small baggy of a powdery substance containing cocaine between two cars near a corner of the club. And blood

reports showed that Caballero had ingested cocaine and methamphetamine in the hours before his death.

[10] Undeniably, the letter at this point is unauthenticated and unreliable. Nonetheless, the letter could have been of some value to the defense, particularly if disclosed at the time police received it. Given the conflicting identification testimony and a letter pointing to another culprit, the non-disclosure of the letter denied the defense important investigative opportunities that had the potential to lead to admissible evidence. Moreover, only law enforcement officials are in a position to authenticate the letter, to say how and when the letter came to be in the file — a task that might have been possible had the prosecution disclosed the letter when it was received.

3.

We next turn to the suppressed evidence revealed during trial. The prosecutor did not disclose before trial that, when arrested, Lopez was found in possession of an ounce of methamphetamine and a handgun. Defense counsel learned of this evidence during the direct examination of Detective Alcantar. Defense counsel immediately moved for a mistrial, which the trial court denied.

Valdovinos's direct appeal raised this issue in the form of a Confrontation Clause issue, arguing that the non-disclosure prevented a meaningful opportunity to cross-examine Lopez at the preliminary hearing. The California Court of Appeals rejected this argument because it found that a cross-examination of Lopez that included this information would not have affected the trial. The court reasoned that defense counsel raised the issue at closing and suggested to the jury that Lopez might be the killer, that Lopez's statements at the preliminary hearing

were conflicting and indicated Lopez might have been covering for Valdovinos, and that defense counsel used the information to argue to the jury that Lopez was telling the authorities what they wanted to hear to escape charges for this possession.

[11] The Supreme Court has held that a *Brady* violation is material if it "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (quotation and citation omitted). Here, the appellate court found that further impeachment of Lopez would not have affected the trial or outcome. On its own, this finding is neither contrary to nor an unreasonable application of established federal law. However, we include the prosecutor's failure to disclose the gun and methamphetamine in the cumulative analysis below.

4.

We now review the materiality of the suppressed evidence collectively. *Kyles*, 514 U.S. at 436; *see also Jackson*, 513 F.3d at 1071. The California court did not have cause to consider the cumulative *Brady* impact because it had before it only the *Brady* claim based on the undisclosed photo lineups. The district court considered the collective impact of the photo lineups, the Lopez impeachment information, the anonymous letter, and the photograph of Mongia. The district court concluded that, given the strength of the evidence against Valdovinos, the cumulative impact of the evidence did not cast doubt on the trial verdict.

This court reviews the district court's holding de novo. *Richter*, 578 F.3d at 951. In conducting the prejudice inquiry, "[w]e may find a 'reasonable probability' [of a different result] even where the remaining evidence would have been sufficient to

convict the defendant. Moreover, we may find a 'reasonable probability' without finding that the outcome would more likely than not have been different." *Jackson*, 513 F.3d at 1071 (citations omitted). The question is whether, in light of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 1079 (quotation and citation omitted).

[12] When considered collectively, the suppressed evidence undermines confidence in the verdict. The Mongia photograph has the potential to weaken the identification testimony by showing that the stand-out characteristic of the shooter — the cowboy hat — was not unique to Valdovinos. The district court relied on the fact that the anonymous letter and the photograph would have been inadmissible at trial. But that conclusion is a product of the circumstances under which they were discovered — belatedly, in the prosecution's file at a police station, by an associate habeas counsel. And while the non-disclosure of the photo lineups did not result in a finding of materiality on its own, as this court has noted, "each additional . . . *Brady* violation further undermines our confidence in the decision-making process." *Id.* at 1072.

[13] Significantly, both the state court and the district court's findings of no prejudice relied heavily on the "strong" eyewitness testimony. But the eyewitness testimony was contradictory about the shooter's physical appearance, his size, build, and what he was wearing. The photo lineup evidence renders the identifications questionable. Castro identified Valdovinos as the shooter at the preliminary hearing, but she picked a person other than Valdovinos in both lineups. Diaz also identified Valdovinos at the preliminary hearing, but could not

identify him from the photo lineups with any degree of certainty. And Valdovinos was the only person included in both photo lineups, despite the fact that Lopez, who also was present at the nightclub that night, was similar in build and stature to Valdovinos. The failure to disclose the gun and drugs found in Lopez's possession, even if not prejudicial on its own, only further solidifies our finding of collective prejudice.

[14] We find the cumulative effect of the suppressed evidence denied Valdovinos a fair trial. The prosecution's repeated failure to disclose evidence favorable to the defense leads us to conclude that Valdovinos did not receive a fair trial resulting in a verdict worthy of confidence. Thus, we reverse with regard to the *Brady* claim and remand with instructions to the district court to issue a writ of habeas corpus.

B.

Valdovinos claims his trial counsel provided ineffective assistance by failing to object to pre-trial statements that Lopez made to investigating police, which the prosecution introduced through the testimony of Sergeant Ramirez.

Valdovinos initially raised this claim in the state appellate court, challenging the trial court's decision to permit the introduction of Lopez's out-of-court statements. In its ruling, the court first held that Valdovinos had waived the right to appeal the introduction of Lopez's statement to police. The court then held that, "[a]ny argument that counsel was ineffective for failing to object is also unavailing."

[15] To prevail on an ineffective assistance of counsel claim, a petitioner must establish: (1) that counsel's performance was deficient, that is, that it fell below an objective standard of reasonableness;

and (2) that he was prejudiced by the performance, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Trial counsel's failure to object to evidence inadmissible under state law can constitute deficient performance under *Strickland*. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996).

The state court observed that Valdovinos's trial counsel highlighted the inconsistencies in Lopez's statement to police at the preliminary hearing. Lopez testified during the preliminary hearing that he told police he saw Valdovinos with a gun, but that he did not actually know if it was a gun. Sergeant Ramirez's testimony at trial about Lopez's statement revealed the same: While Lopez ultimately stated that Valdovinos had a gun, Lopez was anything but convincing. Sergeant Ramirez testified that Lopez told police he had seen Valdovinos with a small pistol. However, Lopez also stated during his police interview that he could not see Valdovinos at the time of the shooting. When Detective Alcantar asked Lopez during the interview to describe the gun, Lopez initially stated he did not know and could not say.

[16] While the state court failed to conduct the inquiry under the *Strickland* framework, the result of the analysis would be the same. The court found trial counsel's failure to object did not prejudice Valdovinos. The district court agreed: "Lopez's testimony was internally contradictory and did not strongly incriminate Petitioner." There did not exist, therefore, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Having found no prejudice, the state

court did not err in declining to investigate the deficient performance prong. *Id.* at 697 ("[T]here is no reason for a court . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

[17] Therefore, we affirm the district court's finding that the state court's decision was neither contrary to federal law nor an unreasonable application of the law to the facts.[4]

Conclusion

A pattern of non-disclosure permeated the proceedings against Valdovinos. "By suppressing this evidence, the prosecution arrogated to itself a central function belonging to the criminal jury and pursued its role as adversary to the exclusion of its role as architect of a just trial." *Jernigan*, 492 F.3d at 1057. In so doing, the government deprived Valdovinos of his due process rights. Because the collective effect of the *Brady* evidence was material, we remand this case to the district court with instructions to issue the writ of habeas corpus, unless California elects to retry Valdovinos within a time period the district court specifies.

---

[4] We note, however, that both the state court and the district court relied on the eyewitness evidence against Valdovinos to support a finding of no prejudice. The *Brady* violations warranting habeas relief negate the strength of this evidence. *Cf. Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). However, because we find the *Brady* violations alone warrant habeas relief, we need not consider the cumulative prejudice of the *Brady* violations with the ineffective assistance of counsel claim. *See Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000).

AFFIRMED in part, **REVERSED** in part, and **REMANDED** with instructions to issue a writ of habeas corpus unless California elects to conduct a new trial within the time period the district court specifies.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FELIX SOLORIO VALDOVINOS,

Petitioner,

v.

ROBERT HOREL,

Respondent.

/

No. C 02-1704 CW

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On April 10, 2002, Petitioner Felix Solorio Valdovinos, an inmate at Pelican Bay State Prison located in Crescent City, California, filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of his state conviction and sentence. Respondent Warden Robert Horel filed an answer to the petition acknowledging that the petition was timely and that all claims raised had been exhausted.[1] Subsequently, this Court appointed counsel to represent Petitioner. Upon appointment, Petitioner's counsel filed a timely traverse. Respondent filed a motion to dismiss on the grounds that the traverse referred to new facts and new legal theories and, thus, contained unexhausted claims such that the petition must be dismissed. On December 3, 2004, the Court issued an order ruling

[1] The Court notes that the caption in the docket indicates that Joe McGrath is the named Defendant in his capacity as warden of Pelican Bay State Prison (PBSP). The Clerk of the Court shall substitute Robert Horel as warden of PBSP. See Rule 25(d)(1) of the Federal Rules of Civil Procedure (if a public officer who is a party to a lawsuit ceases to hold office or resigns, the officer's successor is automatically substituted as a party).

that three claims presented in the traverse were unexhausted and staying the proceedings to allow Petitioner to exhaust these claims in state court. Petitioner did so and filed a motion to lift the stay and amend the petition to add his newly exhausted claims. On March 20, 2007, the Court issued an order granting the motion to lift the stay and amend the petition. On October 10, 2007, Respondent filed an answer to the new petition and on November 12, 2007, Petitioner filed his reply. Having considered all of the papers filed by the parties, the Court DENIES the petition for writ of habeas corpus.

STATEMENT OF FACTS

The following facts are taken from the Court's December 3, 2004 Order. On May 11, 1998, at about 1 a.m., Nelson Caballero was shot to death outside a San Jose nightclub. Caballero had been conversing with a man outside the nightclub when the man fired two shots, both at close range, and both from a .380 caliber semiautomatic handgun. One shot was to Caballero's stomach and the other was to his head. The coroner determined that Caballero was killed by the combination of the two gunshot wounds. Petitioner was ultimately charged with the murder.

At the preliminary hearing and at trial, the prosecution called four acquaintances of Caballero who were with him at the time of the shooting: Joaquin Diaz[2], Tracy Castro, Kyong "Say" Miranda, and Caballero's girlfriend, Blanca Torres. The first three witnesses identified Petitioner as the killer at

---

[2] At trial, Diaz was impeached with a 1996 felony conviction involving moral turpitude and a previous conviction for threatening or dissuading a witness.

the preliminary hearing and at trial. Torres was unable to do so.

At both the preliminary hearing and the trial, Diaz testified that he was standing outside the club with Caballero when another acquaintance, Shalaman[3], joined them. Shalaman pointed to three men coming out of the bar and said they would shoot him if they saw him. Caballero offered to "back up" Shalaman. The three men, who were strangers to Diaz, approached Caballero, Diaz, and Shalaman. The man who would shoot Caballero wore a black cowboy hat, a black leather jacket, and a mustache. He was about as tall or a little shorter than Diaz, who stood five feet six inches. One of the shooter's companions was also dressed "cowboy style" like the shooter and wore a hat; however, he was taller than Diaz. The third man wore no hat, was not dressed "cowboy style" and was Diaz's height. Diaz identified Petitioner as the shooter by pointing to him at the defense table.

According to Diaz, the shooter and Caballero suggested they fight. Diaz then focused his attention on Caballero who proceeded to unbutton his jacket. As Caballero was unbuttoning his jacket Diaz heard a shot, turned, and saw Petitioner holding a handgun and shooting Caballero. When Caballero fell from the first shot, Petitioner walked over to Caballero, shot him again, and then quickly walked away. Petitioner's two companions took off running.

Also present outside the nightclub were Castro and Miranda. At trial, Castro testified that she knew Caballero as a friend from the club, and that when she exited the club that night, she saw Caballero talking to a man. The two men were standing with a

---

[3] The record does not contain the full name of this individual.

group of men approximately twenty-five feet away from Castro. Castro did not know the man with whom Caballero was speaking, but said she was positive he was six feet tall and wore a white cowboy hat, jeans, and a black waist-length jacket. Castro testified that she observed the man shoot Caballero in the stomach and then in the temple. After the shooting, Castro saw the shooter leave with another person in a gray car. At both the trial and the preliminary hearing, Castro identified Petitioner as the man who shot Caballero.

At trial, Miranda testified to the following: she was two or three feet behind Castro as they left the club, and she heard a gunshot and saw smoke but did not actually see a gun. Miranda described the shooter as a Hispanic male wearing a light tan straw cowboy hat, a short leather jacket and denim. She said he was tall, on the slender side, and wore a mustache. Miranda identified Petitioner as the shooter at both the preliminary hearing and trial. She testified that Petitioner, accompanied by a male passenger, drove away from the scene in a gray car.

Torres testified at trial that when Caballero was shot, she was sitting in the driver's seat of her car approximately twenty to twenty-five feet away from him. Torres had previously seen Caballero conversing with four men, two of whom she recognized as Triste[4] and Shalaman, persons she had met at the nightclub. After she heard a "pop," Torres turned and saw Caballero grab his stomach and fall to the ground. At this point, Torres saw only one person, a Hispanic male, standing over Caballero. The man shot Caballero again and then ran past Torres. Torres could not identify the man, but she told the police he

---

[4] The record does not contain the full name of this individual.

was wearing a black hat, a dark jacket, was a bit muscular, and had a mustache.

In addition to Caballero's acquaintances, the prosecution called Isidro Garcia, and read into the record the preliminary hearing testimony and unsworn police statement of Aurelio Lopez. Both Garcia and Lopez lived with Petitioner, and Lopez was also Petitioner's cousin.

Garcia and Lopez were at the club on the night of the shooting. Lopez was dressed like Petitioner. Lopez was wearing a gray cowboy hat, a black leather jacket and boots. Garcia was wearing a black leather jacket, black pants, and boots, but no hat. Garcia and Lopez were leaving the club when Caballero was shot. Both Lopez and Garcia claimed to have heard two shots and to have seen Caballero on the ground. Both men testified that they did not see who fired the shots and did not see Petitioner. After the shooting, Garcia and Lopez got into their car and drove home.

Detective Ernesto Alcantar and Police Sergeant Pete Ramirez investigated the murder. On May 15, 1998, Detective Alcantar showed Castro a six-person photographic lineup. All of the pictures depicted Hispanic males with mustaches and short to medium black hair. Castro did not identify Petitioner but selected another photograph. About a week after the shooting, Diaz viewed the lineup. Diaz chose Petitioner but qualified his choice by saying that he was not sure.

Also on May 15, 1998, Detective Alcantar and Sergeant Ramirez went to Petitioner's apartment looking for him. He was not there but Garcia and Lopez were. The police received consent to search the residence and found an ounce of methamphetamine and a 9-millimeter gun in Lopez's bedroom. Lopez was arrested on an outstanding warrant for gun and

drug possession, and for the gun and drugs found in his room. Lopez was not charged with the latter crimes.

The same day, the detectives interviewed Lopez and Garcia at the police station. When asked if he saw Petitioner with a weapon on the night of the shooting, Lopez said he did but did not know what kind. When questioned further, Lopez stated that the weapon he saw Petitioner with was a gun.

At the preliminary hearing, Lopez admitted that he told Detective Alcantar that Petitioner had a gun, but testified that his statements to Detective Alcantar were not truthful. He explained that he told Detective Alcantar what he wanted to hear because he was afraid to do otherwise. Lopez said he was afraid that he himself might be a suspect. Lopez testified at the preliminary hearing that although the police did not say they would implicate him if he did not talk, they treated him badly before he gave his statement.

During Garcia's interview with Detective Alcantar, Garcia lied and said he had not been at the club and had not seen Petitioner. At trial, Garcia said he lied because Detective Alcantar was verbally abusing him. He testified that he started telling the truth after Detective Alcantar said that Lopez was telling a different story. Garcia said that he was outside the bar during the shooting and that Lopez was wearing a gray hat like Petitioner.

On August 19, 1998, and August 20, 1998, respectively, Detective Alcantar showed Castro and Diaz a second photographic lineup using a different photograph of Petitioner. Again, Diaz chose Petitioner's photo but said he was not sure and Castro identified someone other than Petitioner. Detective Alcantar did not include a photograph of Lopez in either lineup although at trial he testified

that Lopez was similar in size and stature to Petitioner.

At the preliminary hearing on August 25, 1998, Petitioner's defense attorney, in the presence of the prosecutor and Detective Alcantar, requested a "blackboard preliminary"[5] hearing based on a review of the police reports which indicated that the witnesses were never presented with a lineup or photo lineup. Although photo lineups had been conducted, both the prosecutor and Detective Alcantar stood silent when the defense told the court there had been no prior identification. The court denied the defense attorney's request for a blackboard preliminary hearing. At the hearing, Diaz, Castro and Miranda identified Petitioner as the shooter.

On the second day of trial, during his cross-examination of Diaz, defense counsel first discovered that a photographic lineup had been conducted. Diaz's testimony was confirmed by the cross-examination of Detective Alcantar, who admitted that he had administered two separate photographic lineups.

Based on the newly discovered information, defense counsel moved for a dismissal, arguing that the prosecution's failure to provide information regarding the misidentification and tenuous identification of the shooter in the photo lineups substantially changed the way counsel would have handled the preliminary examination and argued the case at trial. The trial court determined that the material was exculpatory material which should have been turned over to the defense in accordance with

---

[5] In a "blackboard preliminary" a screen of some sort is placed between the defendant and any witness so as to prevent the witness from seeing the defendant.

Brady v. Maryland, 373 U.S. 83 (1963) (holding that suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment). However, the court denied the motion to dismiss because it found that the prosecution did not intentionally conceal the exculpatory evidence and therefore did not act in bad faith. To remedy the Brady violation, the court offered defense counsel a continuance and read to the jury California Criminal Jury Instruction number 2.28.[6] Defense counsel declined the offer of a continuance.

---

[6] The court read the following to the jury:

> The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time, and avoid any surprise which may arise during the course of the trial. Concealment of evidence and/or delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena the noncomplying party's evidence.
>
> Disclosures of evidence are required to be made at least thirty days in advance of trial. Any new evidence discovered within thirty days of trial must be disclosed immediately. In this case, the People concealed and/or failed to timely disclose the following evidence: Photo lineups shown to the following witnesses. One, Joaquin Dias, and two, Tracy Castro, and the results thereof.
>
> Although the People's concealment and/or failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during trial. The weight and significance of any concealment and/or delay and disclosure are matters for your consideration. However, you should consider whether the sealed and/or untimely

(continued...)

In addition to withholding evidence related to the identification of Petitioner, the prosecution failed to disclose evidence that defense counsel alleged could be used to impeach Lopez. The prosecutor did not disclose to Petitioner's attorney before the preliminary hearing that, when arrested, Lopez was found to be in the possession of a handgun and an ounce of methamphetamine. Defense counsel learned of the gun and drugs during his cross-examination of Detective Alcantar. Detective Alcantar testified that the information regarding Lopez was not disclosed because Lopez's arrest was considered to be unrelated to the shooting.

Lopez was scheduled to testify for the prosecution at trial, but he absconded. Due to his unavailability, the prosecution requested that the trial court admit Lopez's preliminary hearing testimony in which he mentioned his post-arrest statement to Detective Alcantar that Petitioner had a gun the night of the murder. The trial court granted the prosecution's request over defense counsel's objection to Lopez being declared unavailable. The prosecution also read into the record Lopez's unsworn post-arrest statement to police that Petitioner had a gun the night of the murder. Defense counsel did not object to the admission of Lopez's out-of-court statement.

Based on his untimely discovery of favorable evidence, defense counsel moved for a mistrial, arguing that Lopez's possession of the gun and drugs could have been used to impeach his testimony at the

---

(...continued)

> disclosed evidence pertains to a fact of importance, something trivial, or subject matter already established by other credible evidence.

RT at 324-25.

preliminary hearing and that, without this evidence, counsel had been unable effectively to cross-examine Lopez at the preliminary hearing. The request for a mistrial was denied. The trial court found that the prejudicial impact of the untimely disclosure did not warrant a mistrial. The court, however, suggested that another remedy might be available. Petitioner's attorney chose not to pursue an alternative remedy.

PROCEDURAL BACKGROUND

On December 1, 1998, after a seven day trial, the jury convicted Petitioner of first degree murder and found that in committing the crime he used a firearm and proximately caused great bodily injury to the victim by discharging the firearm. On January 8, 1999, Petitioner was sentenced to a prison term of fifty years to life.

On appeal to the California court of appeal, Petitioner argued (1) the trial court erred in admitting Lopez's preliminary hearing testimony because the prosecution's failure to disclose until trial that the police had found a gun and drugs in Lopez's room prevented Petitioner from having a meaningful opportunity to cross-examine Lopez at the preliminary hearing in violation of the Confrontation Clause; (2) the prosecution's untimely disclosure of exculpatory evidence, i.e. the photographic line-ups, was contrary to Brady and violated due process; and (3) the trial court erred when it failed to answer a jury question critical to the determination of whether the charged homicide was murder in the first or second degree. On August 23, 2000, in an unpublished opinion, the California court of appeal rejected Petitioner's claims and affirmed the judgment. See People v. Valdovinos, H019599 (Ct. App. August 23, 2000).

Petitioner did not seek direct review of the appellate decision, but filed a pro se petition for a writ of habeas corpus in the California Supreme Court on June 29, 2001. (Cal., S098707.) Petitioner presented five claims to the California Supreme Court: (1) Sixth Amendment Confrontation Clause violation based on admission of witness' preliminary hearing testimony; (2) Confrontation Clause based on admission of unavailable witness' out-of-court statement; (3) due process violation based on impermissibly suggestive pretrial photographic identification; (4) Brady violation based on prosecutor's nondisclosure of exculpatory evidence; and (5) ineffective assistance of counsel.

Petitioner requested an evidentiary hearing and the appointment of counsel; both of his requests were denied. On December 19, 2001, the Supreme Court rejected Petitioner's State habeas corpus petition without citation or comment. On April 10, 2002, Petitioner filed a pro se petition for federal habeas corpus relief. The federal habeas corpus petition alleged all of Petitioner's state habeas claims. On August 29, 2002, Respondent filed an answer to the petition and acknowledged that Petitioner had exhausted his state remedies, having presented to the California Supreme Court the claims raised in his federal petition. After counsel was appointed to represent Petitioner, he filed a traverse which contained the following unexhausted claims: (1) ineffective assistance of counsel based on counsel's failure to object to the admission of Lopez's out-of-court police statement and failure to seek a continuance; (2) Brady claim based on newly discovered evidence; and (3) Youngblood claim based on the theory that the prosecution, in bad faith, destroyed material, exculpatory evidence. Petitioner brought these claims in a habeas petition to the

California Supreme Court, which denied them without comment. The Court now addresses all of Petitioner's claims.

LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a district court may grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court only if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In any event, habeas relief is warranted only if the constitutional error at issue is structural error or had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Penry v. Johnson, 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).

"Clearly established federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000); Alvarado v. Hill, 252 F.3d 1066, 1068-69 (9th Cir. 2001). "Section 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Williams, 529 U.S. at 412. A state court decision may no longer be overturned on habeas review simply because of a conflict with circuit-based law. Van Tran v. Lindsey,

212 F.3d 1143, 1154 (9th Cir.), overruled on other grounds in Lockyer v. Andrade, 123 S. Ct. 1166 (2003). Nonetheless, circuit decisions may still be relevant as persuasive authority to determine whether a particular state court holding is an "unreasonable application" of Supreme Court precedent or to assess what law is "clearly established." Id.; Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the State court arrives at a conclusion opposite to that reached by this Court on a question of law or if the State court decides a case differently than this Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413. As summarized by the Ninth Circuit: "A state court's decision can be 'contrary to' federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts 'materially indistinguishable' from those in a controlling case, but nonetheless reaches a different result." Van Tran, 212 F.3d at 1150 (citing Williams, 529 U.S. at 405-07).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the State court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 412-13.

Under 28 U.S.C. § 2254(d)(2), a federal habeas court may grant the writ if it concludes that the state court's adjudication of the claim resulted in a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Torres v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000) (quoting 28 U.S.C. § 2254(d)(2) and Williams, 529 U.S. at 412-

13). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in determining the "unreasonable determination of the facts in light of the evidence" under § 2254(d)(2). Id. at 1107-08 (citing Van Tran, 212 F.3d at 1153-54). To grant relief under § 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." Id. at 1108 (quoting Van Tran, 212 F.3d at 1153-54) (internal quotation marks omitted). A district court must presume correct any determination of a factual issue made by a State court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In determining whether the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest state court to address the merits of a petitioner's claim in a reasoned decision. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); LaJoie v. Thompson, 201 F.3d 1166, 1172 n.9 (9th Cir. 2000). If the state court only considered state law, the federal court must ask whether state law, as explained by the state court, is "contrary to" clearly established governing federal law. Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2002).

The standard of review under AEDPA is somewhat different where the highest state court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim. In such a case, a review of the record is the only means of deciding whether the state court's decision was objectively

reasonable. Greene v. Lambert, 288 F.3d 1081, 1089 (9th Cir. 2002); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001); Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). When confronted with such a decision, a federal court should conduct "an independent review of the record" to determine whether the state court clearly erred in its application of controlling federal law. Id. The federal court need not otherwise defer to the state court decision under AEDPA: "A state court's decision on the merits concerning a question of law is, and should be, afforded respect. If there is no such decision on the merits, however, there is nothing to which to defer." Greene, 288 F.3d at 1089. In sum, "while we are not required to defer to a state court's decision when that court gives us nothing to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001), abrogated on other grounds, Mancuso v. Olivarez, 292 F.3d 939, 944 n.1 (9th Cir. 2002). A summary decision by a state court does not "implicitly" make any factual findings in support of the decision. Id. at 913 (refusing to infer factual findings from state court summary denial of habeas petition).

Here, the only reasoned state court decision is the appellate court's decision on direct review. Because the California Supreme Court issued a summary denial of all of Petitioner's claims presented in his two habeas petitions, this Court must undertake an independent review of the record regarding the claims presented in the petitions to determine whether the state supreme court clearly erred in its application of controlling federal law.

DISCUSSION

I. PRELIMINARY HEARING TESTIMONY OF AURELIO LOPEZ

Petitioner argues that he was denied the right to confront and cross-examine Aurelio Lopez effectively at the preliminary hearing, the only time Lopez appeared as a witness, because the prosecution failed to disclose exculpatory and impeachment evidence to defense counsel in time for him to use it in his cross-examination of Lopez. Respondent argues that the state appellate court's denial of this claim was not contrary to or an unreasonable application of established Supreme Court precedent.

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with witnesses against him." U.S. Const. amend. VI. The federal confrontation right applies to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

The ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. Crawford v. Washington, 541 U.S. 36, 61 (2004). It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Davis v. Alaska, 415 U.S. 308, 315- 16 (1974).

Crawford does not apply retroactively to cases on collateral review. Whorton v. Bockting, 127 S. Ct. 1173, 1184 (2007).[7] For the cases governed by pre-Crawford law, the basic rule is:

---

[7] The parties agree that Crawford does not apply to this case because is was decided after the events at issue occurred.

> [A]n out-of-court statement against a criminal defendant [i]s admissible at trial if two conditions [are] met. First, 'in order to introduce relevant statements at trial, state prosecutors [must] either produce the declarants of those statements as witnesses at trial or demonstrate their unavailability.' [Citations.] Second, even if prosecutors succeed in demonstrating unavailability, the statements are only admissible if they bear 'adequate indicia of reliability.' The 'indicia of reliability' requirement is met if the statements fall within a 'firmly rooted hearsay exception' or contain 'particularized guarantees of trustworthiness.'

Bockting v. Bayer, 505 F.3d 973, 978 (9th Cir. 2007) (citations omitted).

Before Crawford, prior preliminary hearing testimony was admissible at trial where the declarant was unavailable. California v. Green, 399 U.S. 149, 165-66 (1970) (where defendant had opportunity to cross examine declarant at preliminary hearing, no Confrontation Clause violation in admitting statements at trial when declarant professed loss of memory).

The government must show that the witness is "unavailable." Terrovona v. Kincheloe, 852 F.2d 424, 427 (9th Cir. 1988) (dead witness); Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985) (same). This requires that the prosecutor make a good faith effort to obtain the witness's presence. Barber v. Page, 390 U.S. 719, 724-25 (1968).

A Confrontation Clause claim is subject to harmless error analysis. United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004). In the context of reviewing a state court conviction under 28 U.S.C. § 2254, this means that relief is in order only if the

evidence at issue "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623.

The state appellate court summed up the facts relevant to this claim as follows.

> At the preliminary hearing, Lopez testified that Shalaman and appellant had had a fistfight at the nightclub a month earlier but that their disagreement was settled by the time of the shooting. He also said that appellant appeared to have a gun but that Lopez was not sure and that Caballero also had "something on him" though Lopez did not see Caballero display a weapon. Lopez heard Caballero say something like, "Do you have a problem with me" but did not see whether Caballero was getting ready to fight. Lopez never testified that appellant shot Caballero.
>
> On the second day of the prosecution's case, the trial court held a hearing on the question of whether Lopez was an unavailable witness. The defense argued that the prosecution did not act diligently in pursuing Lopez and had therefore failed to show that he was unavailable. The court ruled that the prosecution had exercised reasonable diligence and, hence, that the witness was unavailable.
>
> The next day, Detective Alcantar testified that on May 15, Detective Ramirez found methamphetamine and a gun in Lopez' bedroom in the apartment Lopez shared with appellant, among others. This information was previously unknown to both the prosecution and the defense. Defense counsel moved for a mistrial, arguing that the late disclosure was a discovery violation, that it prejudiced the defense at trial, and that if the information had been timely disclosed, it would have

> affected Lopez's credibility at the preliminary hearing, and counsel's cross-examination of Lopez at that hearing.
>
> Detective Alcantar stated that Ramirez wrote a report under a different case number about the discovery of the gun and drugs but failed to mention it in his report on this case because the information was unrelated to it.
>
> Both the prosecution and defense knew from police reports made available before the preliminary hearing that on May 15 the police arrested Lopez on an outstanding warrant for gun and weapon possession charges, that he was convicted of them, and was released on probation.
>
> The court denied the motion for a mistrial, explaining that "prejudice doesn't amount to that level where it warrants that type of remedy."

People v. Valdovinos, H019599, *10-11.

The state appellate court denied Petitioner's Confrontation Clause claim, reasoning as follows:

> In deciding this claim, the critical question is whether a preliminary hearing cross-examination of Lopez that had included such information would have affected the trial. As we explain, we conclude that it would not have. First, Lopez had a motive to shift blame to appellant that was far more powerful than avoiding prosecution on weapon and drug charges: he wanted to avoid being prosecuted himself for the murder. During closing argument, defense counsel raised this matter when, after reminding the jury that Lopez was present at the shooting, and that drugs and a gun were found in his room, counsel suggested

that Lopez might be the killer. Counsel said that the murder stemmed not merely from a fistfight, but from "a drug deal gone bad." Second, if Lopez was falsely accusing appellant at the preliminary hearing, he was doing so none too directly. Lopez failed to say definitively even that he saw appellant with a gun, much less that he saw appellant shoot Caballero. Defense counsel pointed these facts out in closing argument. Indeed, Lopez's evasive and conflicting statements, both to the police and at the preliminary hearing, suggested that he was trying to cover for appellant, rather than falsely accuse him. In view of the fact that Lopez was evidently trying to avoid incriminating appellant, counsel would not have succeeded by developing relatively mild additional evidence of Lopez's motive for incriminating appellant. Thirdly, defense counsel made full use of the belatedly disclosed information to argue that Lopez was telling the authorities what they wanted to hear in order to avoid prosecution for the later weapon and drug offenses. Accordingly, defense counsel made every conceivable argument to the jury based on the belatedly disclosed information. Thus, appellant fails to demonstrate how the defense would have fared any better if Lopez had been cross-examined at the preliminary hearing on this most recent drug and weapon possession. Similarly, appellant fails to demonstrate how the state's belated disclosure of the evidence deprived him of an opportunity for effective cross-examination of Lopez at the preliminary hearing.

Id. at *12-13.

Petitioner argues that the appellate court incorrectly applied established Supreme Court precedent because it improperly relied upon the defense counsel's argument to the jury as the source of the information for the jury to use in evaluating Lopez's testimony.

The appellate court properly addressed the prejudice analysis. Although the appellate court pointed out that defense counsel's arguments to the jury included all the impeachment material, it did not have to rely on this fact to conclude that the jury verdict would not have been different even if defense counsel had been able to impeach Lopez at the preliminary hearing. This is because, as the appellate court discussed, Lopez's testimony at the preliminary hearing did not particularly incriminate Petitioner as the murderer.

The relevant testimony on direct examination at the preliminary hearing is as follows:

> Q: Did you see the shooting when it started?
>
> A: No, I didn't see that.
>
> Q: Where were you?
>
> A: I was outside also, but I wasn't looking at that. . . .
>
> Q: Now, the day of the shooting, did you see who the shooter was?
>
> A: I didn't see exactly who it was.
>
> Q: Did you see anybody with a handgun in their hand?
>
> A: Well, I didn't see exactly what it was, you know.
>
> Q: Okay. Did you see something that kind of looked like a handgun?

A: Yeah, but the other guy also had something on him, also with him. . . . Well, I don't know if it was a gun, or a beer, I don't know but I saw something.

Q: And who had the gun, or the beer?

A: We, I don't know. I really didn't see who it was. . . .

Q: Did you see people running away from that body?

A: Well, only that. Yes.

Q: And that was within seconds of the shooting?

A: Yes.

Q: And did you see that one of these people running away was Felix [Petitioner]?

A: Yes, because I did, everybody ran.

Q: You would agree, and tell me if you would not, that the person that shot the victim had to be somebody within a small group that was next to him?

A: Well, but I don't know. I don't know. I wasn't looking over there.

Q: Did you ever see Felix with something that appeared to be a gun?

A: Yes, but I don't know if it was a gun. . . .

Q: Did you ever tell this detective seated next to me that you saw Felix with a gun?

A: Well, okay. Well, he asked me that, and he was treating me very badly also, and it wasn't a gun. I don't know what it was. I just said –. In reality, I didn't see that it was a gun.

Q: My question is, did you tell the detective that it was a gun?

A: Well, well – Well, I just said that, because he asked me.

Q: So, you did say it?

A: Well, yeah.

Q: And it was the truth?

A: Well, I don't know. I don't know. I'm not sure.

Clerk's Transcript (CT), Preliminary Hearing Transcript (PHT) at 93-99.

The relevant testimony on cross-examination is as follows:

Q: And did they [the detectives] tell you they were going to implicate you in the murder if you didn't talk?

A: Well, not so much like that, but they did treat me badly. . . .

Q: Now, were you afraid you might be a suspect in the murder when you were answering questions?

A: Yes.

Q: And you knew that they were investigating Felix Solorio Valdovinos; right?

A: Yes.

Q: And did you make things up to implicate Solorio Valdovinos to try to save yourself?

A: Well, no, only what they asked me.

Q: Well, when they asked you, did you see Felix Solorio Valdovinos with a gun, what did you answer when they asked you that?

A: Well, they asked me if I had seen Felix Valdovinos with a gun, and I don't remember -- I don't remember exactly. I don't remember what -- what I said.

Q: If I tell you that you gave a statement to Sergeant Ramirez and Sergeant Alcantar saying that you saw Felix with a gun, would that help you remember what you told the sergeants when they were interviewing you?

A: Well, yeah. I remember saying that, yeah.

Q: Why did you say that, if it wasn't true?

A: Well, they were asking me, did he have something on him, and did he carry something with him.

Q: And did you give them that answer, because you thought that was the answer that they wanted to hear?

A: Well, yeah.

Q: And it was also because you were in custody, and you were afraid of what might happen to you, if you didn't answer that way?

A: Yes. . . .

Q: I note that you're here testifying in custody today, and you're wearing trustee type clothing, have you resolved your case that you were arrested on?

A: Yes.

Q: You plead guilty?

A: Yes.

CT, PHT at 100-04.

This testimony shows that it was not unreasonable for the state court to find that "Lopez's evasive and conflicting statements, both to the police and at the preliminary hearing, suggested that he was trying to cover for appellant, rather than falsely accuse him."

The state court's decision, that the lack of the additional impeachment evidence that the police had found a gun and drugs under Lopez's bed when they arrested him did not prejudice Petitioner, was not contrary to or an unreasonable application of clearly established federal law.

II. SHOWING THAT LOPEZ WAS UNAVAILABLE

Petitioner argues that the release of Lopez on probation, and the failure to keep track of him after his release shows that the prosecution did not exercise sufficient diligence in ensuring Lopez's presence at trial.

The California appellate court addressed this issue as follows:

> Appellant contends that the release of Lopez on probation defeats the prosecution's showing that it used reasonable diligence to locate Lopez. We disagree.
>
> The facts reveal that on August 25, when he testified at the preliminary hearing, Lopez was in custody on charges set forth in the arrest warrant. Lopez pleaded guilty and, between August 25 and October 26, he was released on probation. A few days before October 26, which was scheduled to be the first day of trial, Lopez called the prosecutor and agreed to be on phone standby as a witness. In a subsequent telephone call, Lopez told the prosecutor that he had a new address. The prosecutor

> kept in telephone contact with Lopez every three or four days. However, when the case was assigned to a judge for trial, the prosecutor was unable to contact or subpoena Lopez. His telephone was disconnected, and he had quit his job without saying where he had gone. Efforts to find him at his residence, jails, and hospitals failed. His family did not know where he was.
>
> When Lopez was arrested on the arrest warrant, he possessed a gun and narcotics yet he was not charged with those crimes, and then, after pleading guilty to the arrest warrant charges, he was released on probation. Given these circumstances, appellant claims the prosecution did not do all it could have done to secure Lopez's presence at trial.
>
> This case is distinguishable from People v. Louis, 42 Cal. 3d 969 (1986). In Louis, the prosecution released a crucial witness from jail and he disappeared before trial. By contrast, in this case, Lopez was released upon probation, after pleading guilty to weapon and drug charges. The release upon probation gave the prosecution good reason to believe that Lopez would not abscond. Further, the record shows that the prosecutor kept in touch with Lopez by telephone, and Lopez had agreed to cooperate. Given these circumstances, there was no abuse of discretion.

People v. Valdovinos, H019599, *13-14.

Petitioner cites Ohio v Roberts, 448 U.S. 56, 65 (1980), for the proposition that the prosecution did not adequately show that it made diligent efforts to locate Lopez before he was declared unavailable as a witness.

In Roberts, the Supreme Court stated:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.
>
> A witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial.

Id. at 66, 74 (emphasis in original).

The state court found that the prosecution had good reason to believe that Lopez would not abscond when he was released on probation and that the prosecutor kept in touch with Lopez by telephone after he was released. Furthermore, after Lopez absconded, the prosecution attempted to locate him by contacting his place of employment, his family, hospitals and jails. Based upon this record, the state court did not unreasonably apply Supreme Court authority in finding that the prosecution had made a good faith effort to obtain Lopez's presence at trial.

Therefore, habeas relief based on this claim is DENIED.

III. Admission Of Lopez's Out-Of-Court Statement To Police

Petitioner argues that his Sixth Amendment right to cross-examine Lopez was violated by the admission of Lopez's statement to the police that Petitioner had a gun on the night of the shooting.

The prosecutor elicited testimony from Detective Ramirez that Lopez had told the detectives during his interrogation that he had seen a small

pistol in Petitioner's hand the night of the shooting. RT at 547. On cross-examination, Detective Ramirez testified that, when asked to describe what he saw in Petitioner's hand, Lopez said, "Listen, one becomes scared, you see, I can't tell you. I only saw that he had something but I can't tell, tell you, I don't know." RT at 550. Detective Ramirez testified that this was Lopez's first response, and it was only after further questioning by detectives that he responded that what Petitioner had in his hand appeared to be a pistol. RT at 550.

The appellate court ruled that this claim was waived because Petitioner did not object to Detective Ramirez's testimony at trial.

A federal court will not review questions of federal law decided by a state court if the decision also rests on a state law ground that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). In cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Id. at 750. The Ninth Circuit has recognized and applied the California contemporaneous objection rule in affirming denial of a federal petition on grounds of procedural default where there was a complete failure to object at trial. Inthavong v. Lamarque, 420 F.3d 1055, 1058 (9th Cir. 2005); Paulino v. Castro, 371 F.3d 1083, 1092-93 (9th Cir. 2004); Vansickel v. White, 166 F.3d 953, 957-58 (9th Cir. 1999).

A petitioner may show cause for a procedural default by establishing constitutionally ineffective assistance of counsel, but attorney error short of constitutionally ineffective assistance of counsel does not constitute cause. Id. at 494. To establish good cause on the ground of ineffective assistance of counsel, a petitioner must show that (1) counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and (2) the deficient performance prejudiced the defense. Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

Accordingly, this issue will be addressed below with Petitioner's other ineffective assistance of counsel claims.

IV. IDENTIFICATION PROCEDURES

Petitioner argues that the photo line-up identification procedures used by the police were irreparably suggestive. This claim was presented only to the California Supreme Court which issued a postcard denial. Therefore, this Court independently reviews the record to determine if the state court's denial was contrary to or an unreasonable application of Supreme Court authority.

Procedures by which a defendant is identified as the perpetrator must be examined to assess whether they are unduly suggestive. "It is the likelihood of misidentification which violates a defendant's right to due process." Neil v. Biggers, 409 U.S. 188, 198 (1972). Unnecessarily suggestive pretrial identification procedures alone do not require exclusion of in-court identification testimony, however; reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 100-14 (1977). Identification

testimony is inadmissible as a violation of due process only if (1) a pretrial encounter is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, and (2) the identification is not sufficiently reliable to outweigh the corrupting effects of the suggestive procedure. Van Pilon v. Reed, 799 F.2d 1332, 1338 (9th Cir. 1986).

An identification procedure is impermissibly suggestive when it emphasizes a single individual, thereby increasing the likelihood of misidentification. Foster v. California, 394 U.S. 440, 443 (1969); United States v. Bagley, 772 F.2d 482, 493 (9th Cir. 1985).

In determining whether in-court identification testimony is sufficiently reliable to outweigh a suggestive pretrial procedure, courts consider five factors: (1) the witness' opportunity to view the defendant at the time of the incident; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the time of the identification procedure; and (5) the length of time between the incident and the identification. Manson, 432 U.S. at 114; Neil, 409 U.S. at 199-200; see, e.g., United States v. Jones, 84 F.3d 1206, 1209-10 (9th Cir. 1996) (although drive-by identification by witnesses was suggestive, it was permissible because there was not a substantial likelihood of misidentification); United States v. Wang, 49 F.3d 502, 505 (9th Cir. 1995) (identification of defendant in photographs reliable where witness had ample opportunity to view defendant and actually spoke with him).

Petitioner argues that the two photo line-ups shown to Diaz and Castro were impermissibly suggestive because Petitioner's photo was the only one in both line-ups. He also argues his identification

by Castro, Diaz and Miranda at the preliminary hearing was impermissibly suggestive because he was clothed in jail garb and had his legs and hands shackled so that "the tentative nature of [the witness'] identifications was destroyed by the prosecution when it exposed Castro and Diaz to Valdovinos at the preliminary hearing." Before the trial, Diaz coincidentally saw Petitioner in the hall in prisoner garb and recognized him there. Petitioner argues this pre-trial viewing of him by Diaz was also impermissibly suggestive.

The photo line-ups were not unduly suggestive. The photographs of Petitioner in the two line-ups were described as being very different from each other and from how Petitioner looked at trial. In the first lineup, the photograph of Petitioner was from the California Department of Motor Vehicles (DMV) and Petitioner had curly hair. RT at 411, 442. All the photographs in the first lineup were also DMV photos of Hispanic males, with a mustache and short to medium hair. RT at 444. In the second lineup, the photograph of Petitioner was different than in the first lineup because his hair was shorter. RT at 333, 445. In fact, Diaz was not sure that the photos he picked in the two lineups were of the same man. RT at 334. At the trial, Petitioner did not have a mustache like he did in the two photographs. RT at 332. Petitioner's argument that the lineups were overly suggestive because his photo was the only one that appeared in both, is belied by the fact that his appearance in the two photos was different.

However, even if impermissibly and unnecessarily suggestive pretrial identification procedures were used, the in-court identification need not necessarily be excluded as tainted. In order to analyze the in-court identifications under the factors set out in Manson and Neil, the specific

circumstances of each witness' opportunity to view the shooter on the night of the murder must be considered.

A. Diaz

Diaz, a twenty-five year old Mexican male, testified that, on the night of the shooting, he went to the El Rancho nightclub by himself. RT 254-55. He was acquainted with Caballero, the victim. RT 256. Just before the shooting, Diaz went by himself outside the club into the parking lot. RT 258. Caballero saw Diaz and came over to greet him. RT 258. Then another man named Shalaman came over. RT 259. Shalaman said there were three men who would shoot him if they saw him. RT 261. Diaz saw the three men Shalaman was talking about, but he didn't know who they were. RT 261. The three men came over to where Diaz was standing with Caballero and Shalaman. RT 262. Diaz had no trouble seeing the three men when they walked over to them. RT at 266. The door for exit and entry into the nightclub was lit up.[8] RT 266. One of the men had on a black cowboy hat and was wearing a black leather jacket. RT 263-64. Caballero asked the men whether any of them had a problem with his friend. RT 268. The man in the black hat and leather jacket said he did have a problem with him. RT 268. Then Caballero said, "let's fight," and he started to unbutton his jacket when Diaz heard a shot. RT 269-70. The man in the black jacket started to take his jacket off. RT 271. Diaz was glancing back and forth between Caballero and the man in the black jacket. RT 271. Then Diaz heard another shot. RT 271. He

---

[8] On cross-examination, Diaz agreed with defense counsel that it was dark. RT 327.

turned and saw that the man with the black jacket and black hat was shooting. RT 271. Diaz didn't look at the gun and couldn't describe it. RT 272. Diaz thought the man was going to shoot him and Shalaman also. RT 272. After the first shot, two of the men with the shooter took off running. RT 273. The man with the black hat stayed, went over to Caballero who was on the ground, shot him again, and then he went running. RT 273. The two groups of men were within a pace or two of one another. RT 275. Diaz looked directly into the face of the shooter. RT 277. Diaz identified Petitioner in the courtroom as the shooter. RT 278. When he was asked if he was sure Petitioner was the shooter, Diaz responded, "Yes, yes. The only thing is, that he had a mustache the day that that happened." RT 278.

Applying the Manson and Neil factors, it is apparent that Diaz's in-court identification of Petitioner was sufficiently reliable to be admitted, even if prior identification procedures had been suggestive. First, Diaz had an excellent opportunity to view the shooter at the time of the incident. Second, Diaz's degree of attention was high because after the shooter shot Caballero, Diaz thought he was to be shot also. Third, Diaz's description to the detectives was accurate in that the shooter was a Mexican male who was about Diaz's height[9] and who was wearing a black cowboy hat, a black leather jacket and had a mustache. Fourth, Diaz was very certain of his identification of Petitioner in court as the shooter. Fifth, the length of time between the incident and the first photo line-up was only a few days. There were a few months between the time Diaz viewed the first and second line-ups and

---

[9] Both Diaz and Petitioner are about five foot, six inches tall.

another few months until the identification at the trial. However, given that the first four factors demonstrate a strong indicia of reliability, the fifth factor does not detract from the reliability of Diaz's in-court identification. The fact that Diaz identified Petitioner at the preliminary hearing and in the hall before the trial does not detract from Diaz's reliability as a witness.

Therefore, the state court did not unreasonably apply federal law in rejecting Petitioner's claim regarding Diaz's identification.

B. Castro.

On the night of the murder, twenty-six year old Tracy Castro was driving around with her friend, Say Miranda. RT at 336. They stopped at El Rancho bar so that Castro could use the bathroom. RT at 337. On her way into the bar, Castro ran into Caballero, an acquaintance. RT at 339. Castro and Miranda went into the bar. RT at 341. When they came out the back door into the parking lot, Castro immediately spotted Caballero. RT at 342. He was with a group of men, and was engaged in conversation with one of them. RT at 342. Castro did not know any of the men with Caballero. RT at 342. The man who was talking to Caballero was wearing a cowboy hat, jeans and a black leather waist jacket. RT at 343. The man in the cowboy hat pulled a gun out of his waistband and started firing. RT at 343. Castro was close enough to see the spark from the gun. RT at 343. The distance was about twenty to twenty-five feet. RT at 343-44. Castro is an emergency medical technician; even though she was scared, she walked toward Caballero and the man in the cowboy outfit to see if she could help Caballero. RT at 344. After Caballero fell, the shooter looked at Castro and Miranda, made eye

contact with them, then turned around and shot Caballero in the temple. RT at 345. After this shot, the man in the cowboy outfit stepped over Caballero and walked away, went to his car and drove slowly out of the parking lot. RT at 345-46. Castro acknowledged that she picked photos of men other than Petitioner from two photo lineups she was shown. RT at 353. She said, "Looking at pictures of somebody and seeing somebody's cold-blooded face, you know the difference." RT at 354. Then she identified Petitioner sitting in the courtroom as the shooter. RT at 355.

On cross-examination, Castro stated that she had twenty-twenty vision and that she got a pretty good look at the man who shot Caballero. RT at 366. She admitted that she described to the police a man who was six feet tall. RT at 369. She explained that anyone wearing a cowboy hat and cowboy boots looks quite tall. RT at 368-69. Castro admitted that at first she described the shooter as not having a mustache, but later described him as having a mustache. RT at 371. On re-cross, Castro admitted she had described the shooter as weighing 180 to 190 pounds.[10] Castro also said the shooter was wearing a white cowboy hat. RT at 373. She maintained that she was still sure that the shooter was Petitioner who she had identified in court. RT at 380.

Applying the Manson and Neil factors, Castro's in-court identification of Petitioner was sufficiently reliable to be admitted, even if prior identification procedures had been suggestive. First, like Diaz, Castro had an excellent opportunity to view the shooter. She knew Caballero and saw him talking to the shooter. After the first shot she walked toward

---

[10] At the time of the trial, Petitioner was estimated to weigh about 150 pounds.

the two men, and the shooter looked directly into her eyes. Therefore, like Diaz, she saw the shooter close up. Second, her degree of attention was high. Third, even though she incorrectly told the police the shooter was six feet tall and weighed 180 pounds, other details of her description of the shooter were accurate. Fourth, even though Castro did not select Petitioner in the two photo lineups, she was very certain of her identification of him in court.

Furthermore, Castro twice failed to identify Petitioner in photo line-ups as the shooter. Thus, it seems unlikely that they would have "tainted" her in-court identification of Petitioner.

Therefore, the state court's decision was not contrary to or an unreasonable application of federal law.

V. BRADY CLAIMS

Petitioner argues that the prosecution's failure to disclose the following exculpatory evidence is a constitutional violation under Brady v. Maryland: (1) the gun and methamphetamine discovered in Lopez's possession; (2) the favorable treatment received by Lopez in return for his testimony; and (3) Castro's misidentifications and Diaz's tentative identification in the photo lineups. With his traverse, Petitioner filed four pieces of newly discovered evidence that is part of his Brady claim. The first is an anonymous letter purportedly sent to Caballero's family, found in the prosecutor's case file, and never disclosed to the defense. The writer of the letter claims that Caballero's murder was a contract killing ordered by Ramon Balemos over a debt. Chayra Dec., Ex. A. The second is a written statement from Juan Ledezma stating that Lopez had told Ledezma that (a) Lopez had two guns, a .380 and a 9mm; (b) Lopez had killed someone at a bar in San Jose and placed the blame

on Petitioner; and (c) Lopez told his brother to throw out the gun that he used in that killing. Boyle Dec., Ex. A. The third piece of newly discovered evidence consists of police documents concerning the drugs and gun found in Lopez's possession. Boyle Dec., Exs. C-F. The fourth is a photograph found in the police file of Jose Mongia, a Hispanic male who is dressed in a black hat and black leather jacket, the same clothing believed to have been worn by the shooter.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. The Supreme Court later made clear that the duty to disclose such evidence applies even when there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. at 682.

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice will be found if the suppressed evidence was "material" under state law to the accused's guilt

or punishment. Anderson v. Calderon, 232 F.3d 1053, 1062, 1066 (9th Cir. 2000).

Neither the prosecutor's good faith nor actual unawareness of exculpatory evidence in the government's hands is determinative of the prosecution's disclosure obligations. Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc); United States v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993).

A defendant need only demonstrate a reasonable probability that the result of the proceeding would have been different. United States v. Kojayan, 8 F.3d 1315, 1322 (9th Cir. 1993). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial. Kyles, 514 U.S. at 434; United States v. Golb, 69 F.3d 1417, 1430 (9th Cir. 1995).

A "reasonable probability" may not be based on mere speculation without adequate support. Wood v. Bartholomew, 516 U.S. 1, 6-8 (1995); see, e.g., Downs v. Hoyt, 232 F.3d 1031, 1037 (9th Cir. 2000) (rejecting as speculative argument that withheld material might have led to some admissible evidence which might have been sufficiently favorable to meet the Bagley standard).

As noted, impeachment, as well as exculpatory, evidence falls within the Brady rule. Bagley, 473 U.S. at 676; Giglio v. United States, 405 U.S. 150, 154-55 (1972). "Brady information [therefore] includes 'material . . . that bears on the credibility of a significant witness in the case.'" United States v. Brumel- Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1992) (quoting United States v. Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989)); see, e.g., Killian v. Poole, 282 F.3d 1204, 1210 (9th Cir. 2002) (conviction reversed where

undisclosed letters would have been valuable to the defense in impeaching "make-or-break" witness' credibility before the jury); Singh v. Prunty, 142 F.3d 1157, 1161-63 (9th Cir. 1998) (petitioner entitled to habeas relief where prosecution suppressed evidence of agreement to provide benefits to key witness in exchange for his testimony, and reasonable probability existed that had evidence been disclosed one or more members of jury would have viewed the testimony differently).

The materiality of suppressed evidence is considered collectively, not item by item.. See Kyles, 514 U.S. at 436; Carriger v. Stewart, 132 F.3d 463, 480 (9th Cir. 1997) (en banc).

Delay in disclosure does not deprive an accused of due process where disclosure is made during trial if the disclosure, though tardy, is still of value to the accused. United States v. Vgeri, 51 F.3d 876, 880 (9th Cir. 1995); United States v. Browne, 829 F.2d 760, 765 (9th Cir. 1987). Due process requires only the disclosure of exculpatory material in sufficient time to permit defendant to make effective use of the material. LaMere v. Risley, 827 F.2d 622, 625 (9th Cir. 1987).

A. The Photo Line-ups

This is the only Brady claim that was included in the reasoned decision of the state appellate court.

The facts, as set forth by the appellate court, are

> While cross-examining Diaz, defense counsel discovered that the police had shown photo lineups to both Diaz and Castro. Relying upon the untimely disclosure, defense counsel moved immediately for a dismissal of the charges against appellant. Although the trial court denied the motion, it noted that the ruling

> might have been different had the untimely disclosure occurred after the trial. Defense counsel then moved for a mistrial and argued that he would have handled the preliminary hearing differently had the information been disclosed when it should have been. Counsel did not specify what he would have done differently. Without formally denying the motion, the trial court said it would read an instruction to the jury that explained the situation. The court noted that it had found no willful violation and that defense counsel could pursue the matter in his argument, could call additional witnesses, and could have additional time to prepare. The court then read the jury instruction. (CALJIC No. 2.28)

People v. Valdovinos, HO19599, *16.

Defense counsel did a thorough cross-examination of both Diaz and Castro about the photo lineups and their identifications and emphasized in his closing argument that the non-disclosure of two eyewitness lineups was either negligence or deliberate concealment on the part of the police and prosecutor. RT 661. He also argued that the non-disclosure of the exculpatory evidence prevented the defense from investigating further and developing any defense theories based on it. RT 662.

The appellate court analyzed this claim as follows:

> Appellant relies upon Brady v. Maryland, 373 U.S. 83, 88 (1963) but it does not apply here since in this case the prosecution did disclose the evidence, it just did so in an untimely manner. Accordingly, the question is not whether the evidence was material but whether the untimely

disclosure was material. Thus we must decide how learning of the evidence later rather than sooner prejudiced the defense. (See e.g. United States v. Bagley, 473 U.S. 667, 682 (1985)).

With respect to this issue, appellant merely states that "if counsel for defendant had been provided the information . . . in time to employ that information in cross-examination of the various witnesses, it cannot be said with certainty that the jury would then have [convicted]."

Review of the record discloses that there was no prejudice. Defense counsel was able to cross-examine both Diaz and Castro about their identifications. Counsel also stressed the belatedness of the disclosure during his cross-examination of Alcantar. During closing argument, defense counsel emphasized the issue when he stated: "Let me comment a little bit on the lineups. Okay. I'm appalled: I'm absolutely appalled. In the 10 years I've been a P.D., I've never gone through and in the middle have this issue of lineups come up all of a sudden. Here's an eyewitness, Tracy Castro, who's shown a lineup before we go to preliminary examination, and twice she couldn't ID my client whose picture is in the lineup. At . . . best, it's sloppy police work. At worst, it's deliberate concealment. It's not fair. It's not fair due process. It doesn't allow us to investigate the case. Let me point another thing out. The police, when they showed that lineup to Joaquin Diaz, they know who they're looking for. They know who their suspect is. They've got this lineup okay. They've got a lineup and they're presenting it to Joaquin Diaz, the convicted felon who's on probation, who wants to do whatever he can to help the police to stay out of trouble. He wants

> them out of his face, out of his hair. I wasn't there. I submit to you that it's just human nature to try to help you get the job done, that perhaps it's conveyed or communicated somehow as to who the police are looking for, who the suspect is when they're showing that lineup. In any event, . . . it's again, at best . . . just sloppy police work. At worst, it's deliberate concealment of evidence. And they know perhaps, if we had that evidence, which is exculpatory evidence, we would then follow up, and we would develop our defense based on that exculpatory evidence."
>
> Defense counsel never asked for a continuance to allow him to "follow up" nor has he suggested what such follow up would have been. Appellant does not suggest how the witnesses could have been more effectively cross-examined had he been able to explore their lineup identifications with them at the preliminary hearing. Having failed to show prejudice, appellant's argument must be rejected.

People v. Valdovinos, HO19599, *16-17.

Petitioner argues that the appellate court used a legal standard that was contrary to federal law because it said Brady was inapplicable to Petitioner's claim because he had received the information during the trial. Petitioner is correct that a late disclosure of exculpatory evidence at trial is a Brady violation if the defense cannot effectively use it at trial. Nonetheless, although the appellate court stated that the late disclosure took the claim out of the realm of Brady, it used the correct standard in analyzing the claim. See LaMere, 827 F.2d at 625 (due process requires only disclosure of exculpatory material in

sufficient time to permit defendant to make effective use of the material). Therefore, the appellate court's decision was not contrary to or an unreasonable application of Supreme Court authority.

Petitioner argues that the appellate court's factual analysis was unreasonable because, "although evidence of the photo lineups was discovered during defense cross-examination of Diaz before trial was over and the defense was able to cross-examine Castro and Diaz about their identifications of Valdovinos, the defense was not able to use that evidence to test their recollections of the shooter before the witnesses had been exposed to Valdovinos at the preliminary hearing. . . . the witnesses' identifications of Valdovinos at trial were undoubtedly affected by their repeated exposure to Valdovinos' photographs at the photo lineups and to his physical presence at the preliminary hearing and trial. Defense counsel was unable to prepare to pursue this issue, since he was unaware until cross-examining Joaquin Diaz that any witnesses had ever viewed photo lineups, an opinion the prosecution did nothing to correct at the preliminary hearing." Traverse at 46-47. Petitioner also argues that if defense counsel had known the witnesses had been exposed to Petitioner's photographs, counsel's strategy would have significantly changed in that he could have consulted a memory expert to explore the potentially corrupting effect of the witnesses' exposure to the photo lineups or he could have more effectively argued for a blackboard preliminary hearing.

Petitioner does not state how he could have more effectively cross-examined either Diaz or Castro than he did at the trial. His cross-examination succeeded in showing that Diaz took approximately twenty minutes to decide which photo to select at

each of the two photo lineups and even then his identification was conditional. Castro admitted that she had picked out the wrong person in both photo lineups she had been shown by the police. In his closing, defense counsel emphasized the problems with Castro's and Diaz's eyewitness testimony.

Petitioner does not say how a memory expert would be able to further impeach Castro and Diaz's testimony. Petitioner also does not explain how knowing of the photo lineups would have helped him obtain a blackboard preliminary hearing; his argument for the blackboard hearing was based upon his assumption that neither Castro nor Diaz had seen a photo lineup.

Further, Petitioner's argument that the witnesses' identifications of him at the preliminary hearing were tainted by the undisclosed photo lineups is belied by the evidence. Castro had not been able to identify Petitioner in the photo lineups; therefore, her memory could not have been tainted by viewing them. Diaz only tentatively identified Petitioner in the photo lineups. He did not even know if the two photos he chose were of the same person.

Therefore, neither the appellate court's finding of facts nor its conclusion that no prejudice was caused by the late disclosure of the photo lineups was unreasonable.

B. Lopez Impeachment Information

During Petitioner's trial, after Lopez's preliminary hearing testimony had been read to the jury, Detective Alcantar testified that, on May 15, 1998, Detective Ramirez found methamphetamine and a gun in Lopez's bedroom in the apartment Lopez shared with Petitioner. This information was previously unknown to the defense. Detective

Alcantar stated that Detective Ramirez wrote a report under a different case number about the discovery of the gun and drugs and failed to mention it in his report on Petitioner's case because the information was unrelated to it. The defense knew that, on May 15, the police arrested Lopez on an outstanding warrant for gun and weapon possession charges, and that he was convicted and released on probation.

Petitioner argues that the nondisclosure of the fact that Lopez possessed a gun and methamphetamine several days after the shooting delivered a critical blow to the defense because it could not confront and cross-examine Lopez about it at the preliminary hearing. He also argues that the fact that Lopez was not charged with these crimes is exculpatory information because counsel could have shown that Lopez was biased in his testimony at the preliminary hearing in that he implicated Petitioner in exchange for not being charged with two crimes.

As discussed above, although Lopez testified at the preliminary hearing for the prosecution, his testimony did not particularly incriminate Petitioner as the shooter. Therefore, any lost opportunity to impeach or cross-examine Lopez does not raise a reasonable doubt that the verdict would have been different. Furthermore, defense counsel knew that Lopez was arrested on older gun and drug charges; therefore, any impeachment of Lopez based on guns or drugs could have been undertaken given the evidence known to the defense. Also, the defense knew that Lopez was going to be released on probation on the pending gun and drugs charge. Any inference that Lopez was testifying for the prosecution in order to get a good deal could have been drawn from that fact.

Therefore, the state court did not unreasonably apply federal law in rejecting this claim.

C. Undisclosed Letter

Associate habeas counsel Kathleen Boyle describes a letter found in the police file addressed to Eulalio Caballero, the victim's relative: "The letter appeared to be typed on a typewriter which did not print out the typed letters as the typewriter carriage moved toward the right of the page. However, the imprints of these letters were visible on the original and I copied them onto the copy that I made at the Police Department; all of the handwriting on Exhibit A to the Declaration of Thompson Sharkey is mine." Boyle Dec. at 2. Petitioner also submits the declaration of Sonny Chayra, a Spanish-speaker who was hired by habeas counsel as an investigator, translating the letter to the victim's relative:

> I have come to my decision
>
> To say this
>
> I did not do this (meaning, I was not the shooter who killed Nelson) and I do not know who the shooter is?
>
> I worked w/ Ramon Balemas (could also be last name of Ramon [referencing that he socialized w/Ramon, as well as a business associate w/Ramon])
>
> So send this letter to all your cousins (La Familia?)
>
> This man (referring to Ramon) is very bad, and this man is the person who paid to have "Nelson" killed (take the life of your cousin)
>
> That Ramon gave someone (?) a pistol, an ounce of powder (polbo could also refer to the cartridge-bullets, or to powder, "coke"

> or "meth", however, meth is not usually referred to as "powder") and also $800.00 to kill Nelson.
>
> One of your cousins told me that Nelson (cousin) owed $ for "purchases" and Nelson had yet to pay Ramon to fulfill a debt Nelson owed.
>
> However, Ramon had to wait until Nelson was working to pay a debt of approx. $3K. In December 16 (?) 1996, Ramon paid $1K, from the sale of "merchandise" (possibly drugs) more merchandize (sic) to be sold later.
>
> Well, my friend, until later, don't talk with anyone (no make comments to anyone)
>
> Remember, Ramon tells "untruths" or "lies" ("marrundias" is "a very old term for telling bad things, stories, 'bullshit' etc") also meaning that Ramon cannot be trusted.

Chayra Dec. at 2-3.

Chayra explains the meaning of the letter as follows:

> The general gist of this letter is to advise Eulalio Caballero that Nelson owed Ramon a lot of money, that Ramon gave someone a gun, money and paid someone to do the "hit" on Nelson. This is a letter from a possible member of the Nuestra Familia and or Mexican Mafia ("La Familia") warning that Ramon is very dangerous and to put the word out to La Familia that I (the writer) had nothing to do with the hit on Nelson. . . . The writer wants to clear the air that he was not the shooter and that Ramon was the man who put a contract out on Nelson.

Chayra Dec. at 3.

The copy of the letter in Spanish does not include parentheses or brackets; thus, it can be assumed that the words in parentheses and brackets are Chayra's remarks. Petitioner's trial attorney states in a declaration that he never saw the letter before Chayra showed it to him on May 13, 2004.

Respondent points out that the trial attorney does not state that the information in the letter was not known to him. Nor does he indicate what investigation he made prior to trial and how that investigation would have been different had he been given the letter.

The letter was Brady material in that it raised questions about the prosecution's theory of the motivation for Caballero's killing. It should have been disclosed to the defense. However, like the other Brady claims, this one also fails because its disclosure would not have raised a reasonable doubt that would not have otherwise existed.

The meaning of the letter is questionable because many words have been filled in by Chayra. Because the letter is ambiguous and anonymous, it would not have been admissible at trial. There is no reason to believe the letter would have led to any admissible exculpatory evidence. There was sufficient other evidence introduced at trial for the defense to argue that the killing may have been related to a drug deal. In his closing argument, defense counsel made use of the drug evidence by arguing to the jury:

> What could the motive be? Well, you know Mr. Caballero is a drug dealer. You'll have proof of that, and you can take a look at it when you go back in the jury room. You know he's a drug user. He's been using coke, and he's been using meth. You know Aurelio Lopez is there present. You know

> that Aurelio Lopez — when the cops go to search him or question him, he's got a warrant out for drugs and guns, and also they find an ounce of methamphetamine which is a sales type of amount and a 9 millimeter handgun. You know that much.

RT at 663-64.

The letter does not cast a reasonable doubt on the jury's verdict.

D. Photograph of Mongia

Petitioner argues that the photograph of Jose Mongia wearing a moustache and cowboy hat would have undermined the state appellate court's prejudice analysis because the court relied upon the fact that only Petitioner was identified as wearing a cowboy hat. Although Boyle states that Mongia was a witness to the shooting, there is no admissible evidence that he was. It cannot be concluded that the photograph would have affected Petitioner's trial.

Therefore, the state court's decision was not contrary to or an unreasonable application of federal law.

E. Ledesma Statement

John Ledesma is an individual found and interviewed by Boyle on January 23, 2004. Boyle had Ledesma write a letter in Spanish for which a translation is not provided. Boyle declares that Ledesma told her that Aurelio Lopez had told him that Lopez had two guns, that he had killed someone at a bar in San Jose and had placed the blame on Petitioner, and that he had told his brother to throw the gun away. However, this is not a Brady claim

because Petitioner does not indicate that the prosecutor or police knew of Ledesma or this statement.

F. Brady Material Considered Collectively

Even together, the exculpatory evidence fails to raise a doubt about the outcome of the trial. The eyewitnesses' testimony was strong. The shooter's getaway car was similar to Petitioner's car. And, immediately after the shooting, Petitioner left California for Oregon where he was arrested.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

In his original petition, Petitioner presented numerous ineffective assistance of counsel claims. However, in his reply, Petitioner states that counsel was ineffective for: (1) failing to object to Ramirez's testimony about Lopez's out-of-court statement, which put a gun in Petitioner's hand; and (2) failing to ask for a continuance after learning that the prosecutor had not disclosed evidence of the photo lineups, that a gun and drugs were found in Lopez's bedroom when he was arrested and that Lopez may have received leniency in exchange for his preliminary hearing testimony.

A. Legal Standard

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied upon as having produced a just result. Id.

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim a petitioner must establish two things. First, he must establish that counsel's performance was deficient, that is, that it fell below an "objective standard of reasonableness" under prevailing professional norms. Id. at 687-88. The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689.

Second, he must establish that he was prejudiced by counsel's deficient performance, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. It is unnecessary for a federal court considering a habeas ineffective assistance claim to address the prejudice prong of the Strickland test if the petitioner cannot establish incompetence under the first prong. Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998). Conversely, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. Strickland, 466 U.S. at 697.

The Strickland framework for analyzing ineffective assistance of counsel claims is considered to be "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. Williams v. Taylor, 529 U.S. 362, 404-08 (2000).

A. Lopez's Out-of-Court Statement

The state court found as follows:

> Appellant cannot satisfy this test [Strickland standard]. Review of the record discloses that at the preliminary hearing defense counsel elicited from Lopez the part of his statement to the police that was most significantly inconsistent with his preliminary hearing testimony: that appellant did have a gun. In his preliminary hearing testimony Lopez said only that appellant had what appeared to be a gun and that Lopez was not sure what it was. Further, during closing argument, the prosecution never refuted appellant's contention that Lopez had good reason to tell the police what they wanted to hear. It follows that the jury based its conviction not upon Lopez's testimony or statements but on all the other evidences that pointed toward appellant. To summarize that evidence, only appellant was consistently identified as wearing a cowboy hat, only appellant was identified several times and by several witnesses as the killer, only appellant had the killer's car, and only appellant fled the state immediately after the murder, absconding so hurriedly that he left behind a paycheck. Accordingly, even if we assume that counsel had no rational tactical basis for failing to object, there was no prejudice.

People v. Valdovinos, HO19599, *14-15.

The appellate court's finding that there was no prejudice from counsel's failure to object to Lopez's out-of-court statement was not contrary to or an unreasonable application of federal law. Lopez's testimony was internally contradictory and did not

strongly incriminate Petitioner. Therefore, habeas relief cannot be granted on this claim.

B. Failure to Ask for a Continuance

Petitioner argues that, once trial counsel learned that the prosecution had not disclosed certain exculpatory evidence, he should have asked for a continuance to search the prosecution file to see if it contained other nondisclosed exculpatory evidence.

When defense counsel learned during his cross-examination of Diaz that, unbeknownst to him, Diaz and Castro had been shown two photo lineups, he moved to dismiss the case against Petitioner on the ground of a Brady violation. RT at 303; 316. When the court denied the motion to dismiss, defense counsel moved for a mistrial. RT at 318-19. However, the court ruled that the concealment could be remedied by reading CALJIC 2.28 to the jury. Therefore, defense counsel's representation of Petitioner at the time he learned of the withheld evidence, did not fall below the professional standard of conduct. Furthermore, there is no showing that a continuance would have resulted in anything that would have changed the result of the trial.

The state court's rejection of the claim that defense counsel was ineffective for failing to request a continuance was not contrary to or an unreasonable application of federal law.

VII. YOUNGBLOOD CLAIM

Petitioner contends that the format of the photo lineups shown to Diaz and Castro and the prosecutor's failure to disclose the fact of the photo lineups caused the witnesses' memories to become corrupted. Petitioner argues that this amounts to a

bad faith loss of material exculpatory evidence in violation of Arizona v. Youngblood, 488 U.S. 51 (1988).

The government has a duty to preserve material evidence, i.e., evidence with exculpatory value that was apparent before it was destroyed and that is of such a nature that the defendant cannot obtain comparable evidence by other reasonably available means. California v. Trombetta, 467 U.S. 479, 489 (1984); see also Illinois v. Fisher, 540 U.S. 544, 547-48 (2004); Youngblood, 488 U.S. at 58.

These arguments are variants on Petitioner's suggestive identification and exculpatory information arguments addressed above, and are more appropriately analyzed as such.

Therefore, the state court's rejection of Petitioner's Youngblood claim was not contrary to or an unreasonable application of federal law.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: 3/12/08

CLAUDIA WILKEN
UNITED STATES
DISTRICT JUDGE

S098707

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re FELIX VALDOVINOS on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

SUPREME COURT
FILED
DEC 19 2001
Frederick K. Ohlrich Clerk
Deputy

_____
Chief Justice

S137194

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re FELIX VALDOVINOS on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

SUPREME COURT
FILED
JUL 26 2006
Frederick K. Ohlrich Clerk
Deputy

_____
Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,

v.
FELIX SOLORIO VALDOVINOS,
Defendant and Appellant.
_____/

H019599
(Santa Clara County Super.Ct.No. 207836)

FILED August 23, 2000
Court of Appeal-Sixth App. Dist.
By_____
DEPUTY

Felix Solorio Valdovinos was convicted of first degree murder (Pen. Code, § 187). It was found appellant personally used a firearm (Pen. Code, § 12022.5, subd. (a)(1)), a .380 caliber semi-automatic handgun, and proximately caused great bodily injury by personally discharging a firearm (Pen. Code, § 12022.53, subds. (b),(c),(d)). On appeal, appellant argues (1) the trial court erred in admitting preliminary hearing testimony and a witness's statements to the police; (2) the prosecution's untimely disclosure of photo lineups violated due process; and (3) the trial court erred in answering the jury's question concerning premeditation. We will affirm.

Facts and Procedural Background

On May 11, 1998, at about 1 a.m., Nelson Caballero was shot to death outside a San Jose nightclub. Caballero had been conversing with a

man outside the nightclub when the man fired two shots, both at close range, and both from a .380 caliber semi-automatic handgun. One shot was to the stomach and the other was to Caballero's head.

Appellant was ultimately charged with the murder. Appellant lived in an apartment with Socorro Garcia and their five-year-old child. Aurelio Lopez, appellant's cousin, also lived in the apartment, as did Isidro Garcia, who was Socorro's brother. Both Isidro and Lopez were with appellant at the time of the shooting.

Caballero had come to the nightclub earlier that evening with his girlfriend, Blanca Torres. When they first arrived, they conversed with several friends, did not go inside the club, and then left after about 20 minutes. They returned again at about 12:50 a.m. Caballero went inside and shortly thereafter, Torres also went inside to use the restroom. When she came back outside, Caballero was sitting on the hood of their car.

Torres got into the driver's seat while Caballero conversed with about four men near a blue car about 25 feet away. Torres recognized two of the men, Triste and Shalaman, as persons she had met at the nightclub. Caballero returned to Torres, and because of the way he and the others were acting, she sensed that he was going to get into a fight. Caballero asked Torres to move the car, told her not to worry and explained that he had been asked for a favor. Torres moved the car, parked, listened to the radio, and conversed with friends. Caballero remained with the same group of men. Five or ten minutes later, Caballero motioned for Torres to bring the car back, which she did, and he told her the problem was over.

Shortly thereafter, Torres heard a pop near the car. Still in the driver's seat, she turned to look and saw Caballero near a group of men about 20 or 25

feet away from her. He was "kind of crouched down" grabbing his stomach. Within seconds, he fell to the ground on his back. Torres saw only one person near him at this point, a male Mexican, standing over him about one or two feet away. About five seconds after the first pop, the man shot Caballero again while Caballero was on the ground. The shooter then ran past Torres. Torres said she was not really looking at him and told the police she did not think she could identify him. The shooter wore a cowboy hat and a leather or dark jacket. Torres told the police that his hat was black, he was a little bit muscular, and had a black mustache.

Also present at the shooting scene was Javier Diaz, who knew Caballero from the club. Before the shooting, Diaz went outside the club, and Caballero approached to greet him. Shalaman approached, pointed to three men coming out of the bar, and said they would shoot him if they saw him. Caballero offered to "back up" Shalaman. The three men were strangers to Diaz, though he had seen them earlier that night inside the club.

After about five or ten minutes, the three men approached Caballero, Diaz, and Shalaman. The man who would shoot Caballero wore a black cowboy hat, a black leather jacket, and a mustache. He was about as tall or a little shorter than Diaz, who stood five feet six inches. Diaz identified appellant with certainty as the shooter.

According to Diaz, one of appellant's companions was, like appellant, also dressed "cowboy style." He wore a hat and was taller than Diaz. The third man wore no hat, had closely cropped hair at the sides, was not dressed "cowboy style" and was about Diaz's height.

One of appellant's companions asked for a cigarette. Caballero, who was smoking, said he did

not have one but that the man could ask his girlfriend for one. Caballero asked if one of the strangers had a problem with "my friend." Appellant said he did and Caballero suggested that they fight. The shooter said in Spanish that "[y]ou are going to get into it with me."

As Caballero was unbuttoning his jacket, Diaz heard a shot, turned and saw appellant holding a handgun and shooting Caballero. When Caballero fell from the first shot, appellant walked over, shot again, and then quickly walked away. The shooter's two companions took off running. Diaz was impeached with a felony conviction in 1996 involving moral turpitude. He was also convicted of threatening or dissuading a witness.

Also present outside the nightclub were Tracy Castro and Say Miranda. They had stopped at the club so Castro could use the restroom. On her way inside, Castro saw Caballero, who she knew as a friend from the club, coming out. Caballero asked her for a cigarette and she told him she would get him one after she went inside to use the restroom. A few minutes later, when Castro exited the club, she saw Caballero talking to a man, standing near a group of other men. Castro did not know the man but said he wore a cowboy hat, jeans, and a waist length black leather jacket. According to Castro, the man gave Caballero a hug, and then pulled out a gun and started firing into Caballero's stomach. After Caballero fell to his back, the shooter shot him in the temple, stepped over him and walked away.

Say Miranda was two or three feet behind Castro as they left the club. She testified that she heard a gunshot and saw smoke but not a gun. Miranda described the shooter as a Hispanic male wearing a light tan straw cowboy hat, a short leather jacket, and denim. He was tall, on the slender slide

[*sic*], and wore a mustache. Miranda was certain that appellant was the shooter.

Isidro Garcia arrived at the club between 10 p.m. and 11 p.m. with Aurelio Lopez. Appellant was also at the club. He was wearing a gray cowboy hat, a black leather jacket, and boots. Lopez was dressed the same as appellant, with a gray hat and black jacket. Isidro wore a black leather jacket, black pants, boots and no hat. Lopez and Isidro were leaving the club when the shooting took place. Isidro heard two shots, the victim was on the ground and everyone was running. Isidro did not see appellant and did not see who fired the shots. Isidro and Aurelio got into their car and drove home.

At the preliminary hearing, Aurelio Lopez testified that Shalaman and appellant had a fistfight outside the same bar about a month earlier but that the disagreement was settled by the time of the shooting. On the night of the shooting, Lopez went to the club with Isidro in a brown Geo. They arrived about 9:30 p.m. and appellant was there. According to Lopez, who was present when the shooting occurred, appellant was talking to Caballero and four others. Appellant had what appeared to be a gun but Lopez was not sure what it was. Lopez also testified that he did not see Caballero display a weapon. Caballero said something like, "Do you have a problem with me?" Asked whether it looked like Caballero was getting ready to fight, Lopez said that he "didn't see that well" because he was talking to Isidro. Lopez heard two or three shots, saw the body and saw people running but did not see who the shooter was. He ran to the car and came home.

At the preliminary hearing, defense counsel impeached Lopez with his prior inconsistent statement to the police. Lopez told counsel that when he spoke to the police he had agreed to their

suggestion that appellant was carrying a gun. Because he was afraid to do otherwise, Lopez told the police what they wanted to hear. Lopez was afraid he himself might be a suspect. The police did not say they would implicate Lopez if he did not talk but they did treat him badly before he gave them his statement.

After the shooting, Castro told Torres that she was an emergency medical technician and told her to get Castro's bag of supplies from her car. While doing so, Torres saw a small gray hatchback speeding out of the parking lot driveway. Although several cars were leaving the lot, the gray one was only one that was speeding away.

According to Castro, after the shooting, appellant walked to his car, which was a small, sport style vehicle, gray or silver, with a spoiler. She said the car looked like an RX7 or a 280Z with a spoiler. At trial, Castro was shown a picture of appellant's car and she identified it as the one in which appellant had left the shooting scene.

Miranda testified that the shooter got into a silver gray sporty car, like a Datsun hatchback, and drove it away. A male passenger accompanied him.

The coroner determined that Caballero was killed by the combination of the two gunshot wounds. The coroner could not say which wound occurred first or that one or the other caused death. In Caballero's blood, the coroner found cocaine, cocaine metabolite, and methamphetamine. The coroner's results showed that Caballero had ingested cocaine one to one and one half hours before his death and methamphetamine three to six hours before his death.

From the area where Caballero was killed, police recovered two .380 caliber shell casings and one of the bullets. The other cartridges came from

the same weapon, probably a handgun. Between two cars near a corner of the nightclub, the police found a baggy of a powdery substance containing cocaine. The police could not determine to whom it belonged.

At trial, Torres denied drinking or taking drugs that night. She said that no one in her group was drinking or using illegal drugs. Torres said that she had never seen Caballero use drugs. Caballero told Torres he had previously used drugs and sold them but she did not think he was using them or selling them when he was with her.

Detectives Alcantar and Ramirez investigated the murder. On the night of the shooting, Alcantar interviewed Castro at the police station. She described the shooter as a Hispanic male who was over six feet tall, weighed about 180 pounds, and was wearing a black hat. Appellant is not near six feet tall. Castro explained her mistake by saying that she was very upset at the time she spoke with the police, and that the shooter looked tall because he was wearing a cowboy hat. On the night of the shooting, Say Miranda told the police that the shooter was over six feet tall and slim. At trial, she said he was over six feet tall and heavyset. Like Castro, Miranda said that the shooter's hat made him seem taller.

On May 15, Detective Alcantar showed Castro a six-person photo lineup in which appellant's photo was the second picture. All of the pictures depicted Hispanic males with mustaches and short to medium black hair. Castro testified that she choose [*sic*] the sixth picture. Alcantar stated that she chose the fifth photo.

Appellant's picture was a Polaroid photo that the police obtained from the DMV. Appellant looked different in the DMV photo than he did when he was arrested.

About a week after the shooting, Diaz viewed the photo lineup. Although Diaz chose appellant, he said that he was not sure. He told the police that if the shooter was anyone, it was appellant.

On May 15, Alcantar and Ramirez went to appellant's apartment looking for appellant. He was not there. However, the police spoke with Socorro, Isidro, Antonio Garcia and Lopez. Lopez admitted that he was at the bar on the night of the shooting. After Socorro consented to a search of the residence, the police found an ounce of methamphetamine and a 9-millimeter gun in Lopez's bedroom. Lopez was arrested on an outstanding warrant for gun and drug possession, as well as for the gun and drugs found in his room. However, Lopez was not charged with the latter crimes.

On May 15, Ramirez interviewed Lopez at the police station while Alcantar interviewed Isidro. When asked if he saw appellant with a weapon, Lopez said he did but did not know what kind. Lopez said that he had run away. When Lopez was asked why, Lopez said appellant was carrying something like a pistol. Asked to describe the gun, Lopez said he could not and that he saw only that appellant had "something." When Alcantar said he wanted to know what appellant had in his hand, Lopez answered, "well, . . . a pistol." At trial, Ramirez agreed with defense counsel's summation of Lopez's statement about the gun: Lopez was ambivalent at first but after questioning agreed that appellant was the person with the pistol.

During Isidro's statement with Alcantar, Isidro lied and said he had not been at the nightclub and had not seen appellant. At trial, Isidro said he lied because Alcantar verbally abused him after first turning off the tape recorder. Isidro testified that he started telling Alcantar the truth after Alcantar

returned to the room and said that Lopez was telling a different story. According to Alcantar, Isidro said he was outside the bar during the shooting. After testifying at trial that Lopez wore a gray hat, the same as the one appellant wore, Isidro said he did not remember telling Alcantar that Lopez wore a baseball cap. Alcantar testified that Isidro told him that Lopez wore a brown baseball cap.

Detective Alcantar assembled a second photo lineup using the photo taken of appellant after appellant was arrested. Appellant's picture was the sixth one in the six-photo lineup, which consisted of all Hispanic-looking males. On August 20, Alcantar showed the lineup to Diaz and Castro. Diaz chose appellant but testified at trial that he "wasn't completely sure." According to Alcantar, Castro picked the second photo. Castro testified that she chose the fifth. Alcantar did not include a picture of Lopez in either lineup. Standing five feet six inches and having a slim build, Lopez was similar to appellant in size and stature.

At the preliminary hearing, Diaz, Castro and Miranda all identified appellant as the shooter. Diaz said he was certain when he saw appellant that he was the shooter. Castro explained that she was able to identify him because "[l]ooking at pictures of somebody and seeing somebody's cold-blooded face, you know the difference."

Appellant was arrested on June 12 in Oregon after police tracked him there. The police had discovered that appellant had left the area and left his place of employment without picking up his last paycheck. Police checked with the DMV and learned that appellant was the owner of the silver car. Appellant was returned to California, and on July 8, he was booked.

Appellant was convicted of first degree murder (Pen. Code, § 187). It was found appellant personally used a firearm (Pen. Code, § 12022.5, subd. (a)(1)), a .380 caliber semi-automatic handgun, and proximately caused great bodily injury by personally discharging a firearm. (Pen. Code, § 12022.53, subd. (b),(c),(d).)

This appeal ensued.

Discussion

I. Preliminary Hearing Testimony/Prior Statement

According to appellant, the trial court erred in admitting Lopez's preliminary hearing testimony on the grounds that he was unavailable and erred in admitting Lopez's prior inconsistent statement to the police. Before addressing this contention, we first review the applicable legal principles.

Background Law

Evidence Code section 1291, subdivision (a), provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

The California Supreme Court has recognized that the "[a]dmission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state

Constitutions, not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of confrontation at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (People v. Zapien (1993) 4 Cal.4th 929, 975; People v. Samayoa (1997) 15 Cal.4th 795, 849-850.) The Supreme Court also decided that a defendant's motive in cross-examining a witness at a preliminary hearing may differ somewhat from the motive at trial, but nevertheless the earlier testimony may be admissible at the trial under section 1291 because the "motives need not be identical, only 'similar.' " (People v. Zapien, supra, 4 Cal.4th at p. 975, citing People v. Alcala (1992) 4 Cal.4th 742, 784; see also People v. Samoyoa, supra, 15 Cal.4th 795, 849-850.) In People v. Wharton (1991) 53 Cal.3d 522, the court held the defendant's interest and motive in cross-examining the alleged rape victim at the preliminary hearing in a previous unrelated criminal prosecution was sufficiently similar to the defendant's interest and motive at the subsequent capital trial penalty phase to justify admitting the preliminary hearing testimony pursuant to section 1291. (Id. at p. 589; see also People v. Samayoa, supra, 15 Cal.4th 795, 849-850.)

Unavailability may be established by demonstrating that the witness is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5); see also People v. Robinson (1991) 226 Cal.App.3d 1581, 1585.) In criminal cases, the prosecution is required to make a good faith effort and exercise reasonable

diligence in seeking to secure the witness's appearance. (People v. Hovey (1988) 44 Cal.3d 543, 562; People v. Robinson, supra, 226 Cal.App.3d at p. 1585.) A trial court's finding of due diligence is reviewed under an abuse of discretion standard. (People v. Robinson, supra, 226 Cal.App.3d at p. 1585; People v. Saucedo (1995) 33 Cal.App.4th 1230, 1239.)

Factual Background

With these principles in mind, we next detail the circumstances presented here.

At the preliminary hearing, Lopez testified that Shalaman and appellant had had a fistfight at the nightclub a month earlier but that their disagreement was settled by the time of the shooting. He also said that appellant appeared to have a gun but that Lopez was not sure and that Caballero also had "something on him" though Lopez did not see Caballero display a weapon. Lopez heard Caballero say something like, "Do you have a problem with me" but did not see whether Caballero was getting ready to fight. Lopez never testified that appellant shot Caballero.

On the second day of the prosecution's case, the trial court held a hearing on the question of whether Lopez was an unavailable witness. The defense argued that the prosecution did not act diligently in pursing [*sic*] Lopez and had therefore failed to show that he was unavailable. The court ruled that the prosecution had exercised reasonable diligence and, hence, that the witness was unavailable.

The next day, Detective Alcantar testified that on May 15, Detective Ramirez found methamphetamine and a gun in Lopez's bedroom in

the apartment Lopez shared with appellant, among others. This information was previously unknown to both the prosecution and the defense. Defense counsel moved for a mistrial, arguing that the late disclosure was a discovery violation, that it prejudiced the defense at trial, and that if the information had been timely disclosed, it would have affected Lopez's credibility at the preliminary hearing, and counsel's cross-examination of Lopez at that hearing.

Detective Alcantar stated that Ramirez wrote a report under a different case number about the discovery of the gun and drugs but failed to mention it in his report on this case because the information was unrelated to it.

Both the prosecution and the defense knew from police reports made available before the preliminary hearing that on May 15 the police arrested Lopez on an outstanding warrant for gun and weapon possession charges, that he was convicted of them, and was released on probation.

The court denied the motion for a mistrial, explaining that "prejudice doesn't amount" to that level where it warrants that type of remedy.

Appellant's Arguments

Appellant raises three arguments regarding Lopez's testimony and statements. First, appellant contends that the preliminary hearing testimony should not have been admitted because, in failing to disclose to the defense until trial that police found drugs and a gun in Lopez's room, the prosecution prevented the defense from having a meaningful opportunity to cross-examine Lopez at the preliminary hearing. Second, appellant argues that the prosecution's release of Lopez from custody before

trial defeated the prosecution's showing that Lopez was unavailable for trial. Finally, appellant contends that the trial court erred in permitting Detective Ramirez to testify about statements Lopez made when being interviewed by Ramirez. We address each of these contentions below.

A. Meaningfulness of Prior Cross-Examination

According to appellant, the untimely disclosure prevented defense counsel from conducting an adequate cross-examination of Lopez at the preliminary hearing. For example, appellant states that the belated disclosure kept the defense from knowing that drugs and a weapon were discovered in Lopez's room and also that the state failed to charge those offenses after Lopez gave the police a statement incriminating appellant. According to appellant, if the facts had been known, then counsel would have cross-examined Lopez about whether Lopez was giving evidence against appellant as part of an express or tacit deal with the state to avoid being prosecuted on the drug and weapon charges.

In deciding this claim, the critical question is whether a preliminary hearing cross-examination of Lopez that had included such information would have affected the trial.[11] As we explain, we conclude that it would not have. First, Lopez had a motive to shift blame to appellant that was far more powerful than avoiding prosecution on weapon and drug charges: he wanted to avoid being prosecuted himself for the murder. During closing argument, defense counsel raised this matter when, after reminding the

---

[11] Appellant does not contend, nor could he reasonably do so, that defense counsel could have used the information to win a dismissal of the charges at the preliminary hearing.

jury that Lopez was present at the shooting, and that drugs and a gun were found in his room, counsel suggested that Lopez might be the killer. Counsel said that the murder stemmed not merely from a fistfight, but from "a drug deal gone bad." Second, if Lopez was falsely accusing appellant at the preliminary hearing, he was doing so none too directly. Lopez failed to say definitively even that he saw appellant with a gun, much less that he saw appellant shoot Caballero. Defense counsel pointed these facts out in closing argument. Indeed, Lopez's evasive and conflicting statements, both to the police and at the preliminary hearing, suggested that he was trying to cover for appellant, rather than falsely accuse him. In view of the fact that Lopez was evidently trying to avoid incriminating appellant, counsel would not have succeeded by developing relatively mild additional evidence of Lopez's motive for incriminating appellant. Third, defense counsel made full use of the belatedly disclosed information to argue that Lopez was telling the authorities what they wanted to hear in order to avoid prosecution for the later weapon and drug offenses. Accordingly, defense counsel made every conceivable argument to the jury based on the belatedly disclosed evidence. Thus, appellant fails to demonstrate how the defense would have fared any better if Lopez had been cross-examined at the preliminary hearing on his most recent drug and weapon possession. Similarly, appellant fails to demonstrate how the state's belated disclosure of the evidence deprived him of an opportunity for effective cross-examination of Lopez at the preliminary hearing.

B. Diligence in Locating Lopez

Appellant contends that the release of Lopez on probation defeats the prosecution's showing that it used reasonable diligence to locate Lopez. We disagree.

Factual Background

The facts reveal that on August 25, when he testified at the preliminary hearing, Lopez was in custody on charges set forth in the arrest warrant. Lopez pleaded guilty and, between August 25 and October 26, he was released on probation. A few days before October 26, which was scheduled to be the first day of trial, Lopez called the prosecutor and agreed to be on phone standby as a witness. In a subsequent telephone call, Lopez told the prosecutor that he had a new address. The prosecutor kept in telephone contact with Lopez every three or four days. However, when the case was assigned to a judge for trial, the prosecutor was unable to contact or subpoena Lopez. His telephone was disconnected, and he had quit his job without saying where he had gone. Efforts to find him at his residence, jails, and hospitals failed. His family did not know where he was.

Analysis

When Lopez was arrested on the arrest warrant, he possessed a gun and narcotics yet he was not charged with those crimes, and then, after pleading guilty to the arrest warrant charges, he was released on probation. Given these circumstances, appellant claims the prosecution did not reasonably

do all that it could have done to secure Lopez's presence at trial.

This case is distinguishable from People v. Louis (1986) 42 Cal.3d 969. In Louis, the prosecution released a crucial witness from jail and he disappeared before trial. By contrast, in this case, Lopez was released upon probation, after pleading guilty to weapon and drug charges. The release upon probation gave the prosecution good reason to believe that Lopez would not abscond. Further, the record shows that the prosecutor kept in touch with Lopez by telephone, and Lopez had agreed to cooperate. Given these circumstances, there was no abuse of discretion.

C. Lopez Statement to Police

Appellant contends that the trial court erred in permitting Detective Ramirez to read from his transcribed interview of Lopez.

This claim is waived because appellant did not object below. People v. Zapien, supra, 4 Cal.4th 929 is instructive. In that case, the prosecution offered the preliminary hearing testimony of an unavailable witness and then a prior inconsistent statement the witness had made to a police officer. (Id. at p. 978.) Defense counsel objected to the preliminary hearing testimony but did not object to the prior inconsistent statement. Relying upon Evidence Code section 353, Zapien held that the failure to object barred the defendant from challenging the admission of the statement on appeal. (Id. at pp. 978-979.)

Any argument that counsel was ineffective for failing to object is also unavailing. To address this claim, we must consider whether counsel could have had no rational tactical purpose for not objecting, and whether the result would have been more favorable

to the defense if counsel had objected. (People v. Zapien, supra, 4 Cal.4th at p. 981.)

Appellant cannot satisfy this test. Review of the record discloses that at the preliminary hearing defense counsel elicited from Lopez the part of his statement to the police that was most significantly inconsistent with his preliminary hearing testimony: that appellant did have a gun. In his preliminary hearing testimony Lopez said only that appellant had what appeared to be a gun and that Lopez was not sure what it was. Further, during closing argument, the prosecution never refuted appellant's contention that Lopez had good reason to tell the police what they wanted to hear. It follows that the jury based its conviction not upon Lopez's testimony or statements but on all the other evidences that pointed toward appellant. To summarize that evidence, only appellant was consistently identified as wearing a cowboy hat, only appellant was identified several times and by several witnesses as the killer, only appellant had the killer's car, and only appellant fled the state immediately after the murder, absconding so hurriedly that he left behind a paycheck. Accordingly, even if we assume that counsel had no rational tactical basis for failing to object, there was no prejudice.

Appellant also suggests that the Confrontation Clause requires a witness to be present before a prior out-of-court statement may be used to impeach him. (California v. Green (1970) 399 U.S. 149.) In addition, in People v. Williams (1976) 16 Cal.3d 663, the California Supreme Court held that Evidence Code section 1235, which authorizes admission of prior inconsistent statements, does not apply when the witness is unavailable for cross-examination.

(But see Evid. Code, § 1294.)[12] We need not decide this issue since, as we have discussed above, even if the evidence was erroneously admitted, appellant cannot show a reasonable probability of a more favorable outcome had counsel acted to have the evidence excluded.

II. Police Lineup

Appellant contends that the prosecution's untimely disclosure of the fact that both Diaz and Castro had been shown photo lineups violated due process.

Factual Background

While cross-examining Diaz, defense counsel discovered that the police had shown photo lineups to both Diaz and Castro. Relying upon the untimely disclosure, defense counsel moved immediately for a dismissal of the charges against appellant. Although the trial court denied the motion, it noted that the ruling might have been different had the untimely disclosure occurred after the trial. Defense counsel then moved for a mistrial and argued that he would have handled the preliminary hearing differently had the information been disclosed when it should have been. Counsel did not specify what he would have done differently. Without formally denying the motion, the trial court said it would read an instruction to the jury that explained the situation. The court noted that it had found no willful violation and that defense counsel could pursue the matter in

---

[12] The California Supreme Court has granted review in a case involving a similar issue, People v. Haynes (1999) 72 Cal.App.4th 337.

his argument, could call additional witnesses, and could have additional time to prepare. The court then read the jury the instruction. (CALJIC No. 2.28.)

Analysis

Appellant relies upon Brady v. Maryland (1963) 373 U.S. 83, 88[,] but it does not apply here since in this case the prosecution did disclose the evidence, it just did so in an untimely manner. Accordingly, the question is not whether the evidence was material but whether the untimely disclosure was material. Thus, we must decide how learning of the evidence later rather than sooner prejudiced the defense. (See e.g. United States v. Bagley (1985) 473 U.S. 667, 682.)

With respect to this issue, appellant merely states that "if counsel for defendant had been provided the information . . . in time to employ that information in cross-examination of the various witnesses, it cannot be said with certainty that the jury would then have [convicted]."

Review of the record discloses that there was no prejudice. Defense counsel was able to cross-examine both Diaz and Castro about their identifications. Counsel also stressed the belatedness of the disclosure during his cross-examination of Alcantar. During closing argument, defense counsel emphasized the issue when he stated: "Let me comment a little bit on the lineups. Okay. I'm appalled; I'm absolutely appalled. In the 10 years I've been a P.D., I've never gone through and in the middle have this issue of lineups come up all of a sudden. Here's an eyewitness, Tracy Castro, who's shown a lineup before we go to preliminary examination, and twice she couldn't ID my client

whose picture is in the lineup. At . . . best, it's sloppy police work. At worst, it's deliberate concealment. It's not fair. It's not fair due process. It doesn't allow us to investigate the case. Let me point another thing out. The police, when they showed that lineup to Joaquin Diaz, they know who they're looking for. They know who their suspect is. They've got this lineup okay. They've got a lineup and they're presenting it to Joaquin Diaz, the convicted felon who's on probation, who wants to do whatever he can to help the police to stay out of trouble. He wants them out of his face, out of his hair. I wasn't there. I submit to you that it's just human nature to try to help you get the job done, that perhaps it's conveyed or communicated somehow as to who the police are looking for, who the suspect is when they're showing that lineup. In any event, . . . it's again, at best . . . just sloppy police work. At worst, it's deliberate concealment of evidence. And they know perhaps, if we had that evidence, which is exculpatory evidence, we would then follow up, and we would develop our defense based on that exculpatory evidence."

Defense counsel never asked for a continuance to allow him to "follow up" nor has he suggested what such follow up would have been. Appellant does not suggest how the witnesses could have been more effectively cross-examined had he been able to explore their lineup identifications with them at the preliminary hearing. Having failed to show prejudice, appellant's argument must be rejected.

III. Jury Question

Appellant contends the trial court erred in answering a question from the jury. We disagree.

Background

On the jury's last day of deliberations, it sent the following question to the court: "We, the jury in the above-entitled matter request the following: clarification of premeditation: is there premeditation present in the act if only part of the act is premeditated (the second shot)?"

With the concurrence of counsel, the court responded: "[T]he answer is, there could be. It's a jury question. The jury may find that there was or there was not [premeditation], but the pertinent instruction with respect to that would be your instruction number 8. [CALJIC No. 2.02] That says—and premeditation is a state of mind, right?—[T]hat you have to find [a mental state] or specific intent. It's at least one of the two. The specific intent and/or mental state with which an act is done may be shown by the circumstances surrounding the commission of an act, so you look at all the circumstances that surround . . . the commission of a particular act, and then the jury determines whether or not there was that specific intent and/or mental state or whether it wasn't. So I can't give you a yes or no because that's the exclusive province of the jurors to make that determination. And . . . if you need to know or if you're wondering what is that specific intent or mental state that's required because you mentioned the word premeditation, then you go to instruction number 33, and that gives you the definition of premeditation. But in order to determine what a person is thinking or that he had a specific intent or certain state of mind—can't read another person's mind, so you have to look at the circumstances surrounding the commission of that particular—all of the circumstances, and then you determine if he did A and then B or B then A. Or if

you think he had a certain intent when he did A, does it mean automatically he did it, had that same intent when he did B? That's for you to decide, but look at all the circumstances surrounding the commission of the act. Then make your determination. So the answer is it could mean yes and it could mean no. It's for the jurors to decide."

The court then asked counsel if they wanted the court to tell the jury anything else, and both counsel responded, "no." The court noted and both the defense counsel and prosecutor agreed that the court and attorneys had discussed the matter in chambers and that the attorneys requested that the court give the answer it did.

Analysis

Any error was invited. Although appellant complains that the court should have told the jury that the absence of premeditation before the first shot would make a difference if the victim was already dead when the second shot was fired, defense counsel endorsed the court's answer to the jury's question. A defendant may not object on appeal to an erroneous instruction that he requested. (People v. Cain (1995) 10 Cal.4th 1, 38, fn. 15; 45; People v. Rodrigues (1994) 8 Cal.4th 1060, 1134-1135; People v. Wader (1993) 5 Cal.4th 610, 657-658.)

Even if the error was not invited, the argument must still be rejected. Although the first shot was fatal in the sense that it would have killed the victim even if the second shot had not been fired, the coroner never said it was immediately fatal. In fact, because the coroner could not say which of the shots caused death, the coroner determined the cause of death to be the combination of the two shots. Moreover, Castro, the paramedic who attended

Caballero immediately after the second shot, testified without contradiction that Caballero had a pulse and was still breathing. Given this evidence, no reasonable jury could have found that Caballero died before the second shot was fired, and therefore appellant's argument is without merit.

Disposition

The judgment is affirmed.

Elia, J.

WE CONCUR:

Cottle, P.J.

Mihara, J.
People v. Valdovinos
H019599

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FELIX SOLORIO VALDOVINOS,
Petitioner-Appellant,

v.

JOE MCGRATH,
Respondent-Appellee.

No. 08-15918

D.C. No. 4:02-CV-01704-CW
Northern District of California, Oakland

FILED April 26, 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

ORDER

Before: B. FLETCHER and KLEINFELD, Circuit Judges, and DUFFY, Senior District Judge. *

The panel has voted to deny the petition for panel rehearing. Judge Kleinfeld has voted to deny the petition for rehearing en banc and Judges B. Fletcher and Duffy so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

---

*The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

S137194

SUPREME COURT
FILED
SEP – 9 2005
Frederick K. Ohlrich Clerk
/s/
DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re FELIX SOLORIO VALDOVINOS, Petitioner,

No. Direct Appeal:

Crim. No. H01959[9]

On Habeas Corpus

Prior Habeas No. S098707

/

Santa Clara County Superior Court No. 207836
The Honorable James H. Chang

PETITION FOR WRIT OF HABEAS CORPUS

CHRISTOPHER J. CANNON
Attorney at Law
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
Telephone: (415) 362-6252
Facsimile: (415) 677-9445
State Bar No. 88034

Attorney for Appellant
FELIX S. VALDOVINOS

PETITION FOR WRIT OF HABEAS CORPUS

In re Felix Solorio Valdovinos,
Petitioner,
On Habeas Corpus No. _____
Related Habeas Petition S098707
Related Appeal, No. H019599
Santa Clara County
Sup. Court No. 207836

PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Felix Solorio Valdovinos respectfully petitions this Court for a writ of habeas corpus because the trial court allowed out of court statements by the main witness to be admitted against him in violation of the United States Supreme Court's opinions in Crawford v. Washington (2004) 541, U.S. 36, 124 S.Ct. 13; and Brady v. Maryland (1963) 373 U.S. 8; because he was unable to effectively cross-examine that witness at the preliminary hearing due to the prosecutions failure to provide Brady information in a timely fashion; because the prosecution, in bad faith, corrupted the memories of witnesses to the shooting in violation of Arizona v. Youngblood (1988) 488 U.S. 51; and because newly discovered evidence indicates that Valdovinos is factually innocent of the crimes charged.

By this verified petition, petitioner sets forth the following facts and causes for the issuance of the writ:

1. Petitioner is unlawfully held in custody at Solano State Prison by the Warden, and by the Director of the Department of Corrections.

2. Petitioner is confined pursuant to a judgment of imprisonment of 50 years rendered on January 8, 1999 in Santa Clara County Superior Court, No. 207836, Hon. James H. Chang Judge.

3. In that proceeding petitioner was charged with murder and personal use of a firearm.

4. Petitioner is entitled to issuance of a writ of habeas corpus vacating his sentence because he was convicted based upon out of court[1] statements of a witness who was unavailable for trial.

5. The prosecution failed to disclose exculpatory information impeaching that witness and Petitioner did not learn of that information until the trial.

6. The prosecution allowed the memories of witnesses to be corrupted by failing to disclose the existence of prior identification procedures when Petitioner made a request for a Blackboard Preliminary hearing.

7. Since the original Petition in this case, Petitioner has discovered additional exculpatory information which undermines confidence in the jury verdict and there is a reasonable probability the jury would have reached a different result

---

[1] One statement was a completely out of court statement to the police. The other statement was a statement given at a preliminary hearing before Valdovinos learned of significant impeaching material and exculpatory evidence.

PETITION FOR WRIT OF HABEAS CORPUS 2

if suppressed Brady material had been provided to the defense in a timely matter.

8. The newly discovered additional Brady material and other newly discovered exculpatory evidentiary material strengthens the claims Valdovinos has previously made in this Court and in the Court of Appeal and provides support for new claims.

9. When the legal and factual basis of Petitioner's old claims are reconsidered and bolstered by the newly discovered evidence and new legal theories, the record demonstrates that the conviction in this case was the result of a fundamental miscarriage of justice.

10. Specifically, after counsel was appointed on Federal Habeas, he[2] discovered the prosecution had suppressed at least three separate and important items of great exculpatory value:

a. A letter describing the killing as a contact killing addressed to Eulalio Caballero, presumably a relative of victim Nelson Caballero. The letter informed Caballero that his relative's shooting was a contract killing ordered by Ramon Balemos because Nelson owed Balemos money. (Ex. 7 p 332: See Also

PETITION FOR WRIT OF HABEAS CORPUS 3

---

[2] Present counsel was assisted in the Federal Habeas action by two other California Lawyers, Kathleen Boyle and Laura Murry, who worked as associates with the firm of Sugarman and Cannon. This brief will not make distinctions between lead counsel, Christopher Cannon and his former associates Kathleen Boyle and Laura Murry.

Ex. 5, p. 300 Declaration of Kathleeen Boyle p.4 (filed in conjunction with the Traverse) This letter was discovered in the prosecution's case file on March 30, 2004 by current counsel. (Id.)

b. A photograph of a witness, Jose Mongia, interviewed by police at El Rancho Grande the night of the shooting. That witness, like many of the other individuals present that evening, was dressed in "ranchero" style. The photograph shows Jose Mongia dressed in a black hat and black leather jacket, the same items allegedly worn by the shooter. (See Exhibit 5, p 301 Decl. Kathleen Boyle ¶ 8). The photograph was discovered in the prosecution's case file on March 30, 2004 by current counsel. (Id.)

c. Police reports referring to the discovery of the gun and methamphetamine in the possession of Aurelio Lopez. Contrary to the prosecution's assertion during the prosecution of Valdovinos, these documents were interspersed throughout Valdovinos' case file and, with the exception of the police report which was inside a sub-file labeled "98-135-1119 Dope Case", were in no way separated from documents regarding Valdovinos' case. (See Exhibit 5 p 301-302. Dec. of Kathleen Boyle p.p. 9, 10; see also Tr. p. 40, n. 15). The police reports were discovered

in the prosecution's case file on March 30, 2004 by current counsel. (Id.)

11. Counsel also independently obtained a statement

from Juan Ledezma that Mr. Lopez (the state's critical witness who was deemed unavailable at trial) admitted to him that Mr. Lopez was the shooter and had placed the blame on Valdovinos. Mr. Lopez also told Mr. Ledezma that Lopez possessed two guns and that after the shooting Mr. Lopez directed his brother to dispose of the second gun. (Exhibit 5 p 299-300).

12. These newly discovered additional materials strengthen the claims Valdovinos has previously made in this Court and provide support for additional claims raised in this Petition. When the legal and factual basis of Petitioner's prior claims are reconsidered and bolstered by the newly discovered evidence, and his claims based upon newly discovered evidence and legal analysis assisted by counsel are considered, the record demonstrates that the conviction in this case was the result of a fundamental miscarriage of justice and this Petition must be granted.

13. Specifically this second Petition for a Writ of Habeas Corpus is based on: 1) a violation of Petitioner's due process and Brady rights to be provided with exculpatory information in time to use that information at trial; 2) the violation of Valdovinos' Sixth Amendment right to confront and cross-examine witnesses against him, specifically Aurelio Lopez; 3) the prosecution's introduction of Lopez's out of court statements implicating Valdovinos; 4) the

violation of Valdovinos' due process right to a fair trial, as well as his right to effectively confront and cross-examine witnesses because the prosecution did not disclose exculpatory evidence to the defense, specifically a) Lopez's possession of a gun and drugs, b) Lopez's favorable treatment by the prosecution with respect to those crimes, c) the inability of other witnesses to identify Valdovinos at a photographic line-up, d) the presence of other individuals dressed as Valdovinos was described by some witnesses and e) the existence of a letter describing the killing as a contract killing ordered by a man unconnected to Petitioner; 5) the violation of Valdovinos' due process rights to a fair trial as a result of prejudicial identification practices; 6) the bad faith or negligent destruction of evidence by the prosecution which irrevocably tainted the memories of witnesses Tracy Castro and Joaquin Diaz and 7) a violation of his due process right to a fair trial and Sixth Amendment right to the effective assistance of trial counsel, because trial counsel failed to move for a continuance after the disclosure of some of the available Brady material, and failed to effectively object to the out of Court testimony of the primary witness against Valdovinos. In addition, appellate counsel was ineffective because appellate counsel failed to discover and alert the Court of Appeal to photographs in the prosecution file which showed other individuals present at the scene dressed consistently with some of the descriptions of the shooter.

14. The district court has found that the claims that: trial counsel was ineffective because (1) he failed to object to the admission of Lopez's out of

court statement and (2) failed to move for a continuance once a portion of the available Brady material was disclosed; Petitioner's Brady claim based upon newly discovered evidence; and Petitioner's Youngblood claim alleging that the prosecution in bad faith destroyed exculpatory evidence were not yet exhausted. The claim that counsel was ineffective for failing to discover and present to the Court of Appeal the picture of Mongia from the prosecution file is a new claim.

15. Petitioner refers to and incorporates herein by reference the contemporaneously filed Memorandum of Points and Authorities.

16. Petitioner has no plain, speedy, or adequate remedy at law to raise the above claim. He has not presented the total grounds for relief raised here in any other petition, motion, or application to any court except insofar as the claims are implicated on his direct appeal, his prior habeas petition to this Court and his Federal Habeas Petition.

17. This is Petitioner's second petition for writ of habeas corpus filed in this Court, relating to this confinement and restraint.

18. WHEREFORE, Petitioner respectfully requests that this Court:

a. Take judicial notice of the record in petitioner's direct appeal, No. H0[1]9599;

b. Issue an order to show cause before this Court why it should not vacate petitioner's sentence;

c. Upon review of the petition and response, vacate petitioner's conviction in Santa Clara County Superior Court, No. 207836 and remand this matter for further proceedings;

d. Grant petitioner such other and further relief as the Court determines appropriate.

For all the foregoing reasons, Petitioner respectfully requests this Court to grant the petition for writ of habeas corpus.

/s/

Dated: September 9, 2005 Respectfully submitted,
Christopher J. Cannon
Attorney for Petitioner

VERIFICATION

I, Christopher J. Cannon, declare:

I am a member of the Bar of the State of California. I am the attorney for petitioner Felix Solorio Valdovinos, who is confined and restrained of his liberty at Solano State Prison, in Vacaville, California.

I am authorized to file this petition for writ of habeas corpus on his behalf.

I make this verification because petitioner is incarcerated in a county different from that of my law office and because these matters are more within my knowledge than his.

I have read the foregoing petition for writ of habeas corpus. I declare that all the matters alleged here are true of my own personal knowledge or are supported by the record in Petitioner's direct appeal, No. H019599, or by the contemporaneously filed exhibits.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 9, 2005, at San Francisco California.

/s/
Christopher J. Cannon
Attorney for Petitioner

PROOF OF SERVICE BY U.S. MAIL

I, the undersigned, declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 44 Montgomery Street, Suite 2080, San Francisco, California 94104.

On September 9, 2005, I served the within:

PETITION FOR WRIT OF HABEAS CORPUS

on the parties:

Jeremy Friedlander
Deputy Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

I declare under the penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 9, 2005, at San Francisco, California.

/s/
Natalja Sust

S137194 ORIGINAL

SUPREME COURT
FILED
SEP – 9 2005
Frederick K. Ohlrich Clerk
/s/
Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re FELIX SOLORIO VALDOVINOS, Petitioner,

No. Direct Appeal:

Crim. No. H01959[9]

On Habeas Corpus

Prior Habeas No. S098707

/

Santa Clara County Superior Court No. 207836
The Honorable James H. Chang

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

CHRISTOPHER J. CANNON
Attorney at Law
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
Telephone: (415) 362-6252
Facsimile: (415) 677-9445
State Bar No. 88034

Attorney for Appellant
FELIX S. VALDOVINOS

TABLE OF CONTENTS

I. INTRODUCTION....1
II. PROCEDURAL FACTS....6
III. GENERAL ALLEGATIONS....14
IV. CLAIMS FOR RELIEF: PRELIMINARY ALLEGATIONS....17
A. Rights Violated....17
B. Factual Showing....18
C. Timelines[s]....18
V. PARTICULAR CLAIMS....18
1. INTRODUCTION....18
2. STATEMENT OF FACTS....21
3. EYEWITNESS TESTIMONY AND THE PHOTO LINEUP....23
4. DISCOVERY OF LOPEZ' GUN AND DRUGS....35
VI. ARGUMENT REGARDING PARTICULAR CLAIMS....39
1) THE PROSECUTION VIOLATED BRADY AND CALIFORNIA PENAL CODE § 1054 BY NOT DISCLOSING EVIDENCE OF THE GUN, LOPEZ'S FAVORABLE TREATMENT, THE PICTURES OF OTHERS DRESSED LIKED VALDOVINOS, PHOTOGRAPHIC LINEUPS, AND THE LETTER DESCRIBING THE KILLING AS A CONTRACT KILLING....39
A. THE PROSECUTION WITHHELD MATERIAL EXCULPATORY EVIDENCE....39

B. THE FAILURE TO DISCLOSE THE EXCULPATORY INFORMATION ALSO VIOLATED DUE PROCESS AND CALIFORNIA PENAL CODE SECTION 1054 49
C. THE DEFENSE'S DISCOVERY OF SOME OF THE EXCULPATORY EVIDENCE TOWARDS THE END OF TRIAL DOES NOT EXCUSE THE PROSECUTION'S BRADY VIOLATION 51
2) PETITIONER VALDOVINOS WAS DENIED HIS RIGHT TO EFFECTIVELY CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM 55
A. VALDOVINOS WAS UNABLE TO CONFRONT AND CROSS-EXAMINE THE PRINCIPAL PROSECUTION WITNESS AGAINST HIM 55
B. ADMISSION OF LOPEZ'S OUT OF COURT STATEMENTS TO POLICE OFFICERS 65
3) IF THIS CASE TURNS ON A LACK OF OBJECTION TO RAMIREZ' TESTIMONY, THAT FAILURE TO OBJECT WOULD BE INEFFECTIVE ASSISTANCE OF COUNSEL 70
4) THE FAILURE TO REQUEST A CONTINUANCE WAS INEFFECTIVE ASSISTANCE OF COUNSEL 72
5) THE PROSECUTION DESTROYED MATERIAL EXCULPATORY EVIDENCE BY ALLOWING THE WITNESSES TO BE EXPOSED TO VALDOVINOS AT THE PRELIMINARY HEARING 76

A. THE PROSECUTION'S BRADY OBLIGATIONS INCLUDE PRESERVATION OF MATERIAL EXCULPATORY EVIDENCE.....76
B. IDENTIFICATIONS OF PETITIONER VALDOVINOS WERE TAINTED BY THE PREVIOUS UNDISCLOSED PHOTO LINEUPS.....77
a. UNRELIABILITY OF EYEWITNES[S]

ii

IDENTIFICATION 77
b. EXTENSIVE PSYCHOLOGICAL AND SOCIOLOGICAL RESEARCH DEMONSTRATES THE FALLIBILITY OF EYEWITNESS IDENTIFICATION, AS WELL AS THE SIGNIFICANT WEIGHT JURIES MAY ERRONEOUSLY ATTRIBUTE TO EYEWITNESS ACCOUNTS 83
c. SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION IS INADMISSIBLE 89
6) THE CORRUPTING EFFECT OF THE SUGGESTIVE IDENTIFICATION IS NOT OVERCOME BY THE OTHER CIRCUMSTANCES SURROUNDING THE IDENTIFICATION.....94

VII. CONCLUSION 98

(4)

No. 10-136

Supreme Court, U.S.
FILED
AUG 20 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HOREL, WARDEN

Petitioner,

v.

FELIX SOLORIO VALDOVINOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Christopher J. Cannon (CBN 88034)
Sugarman & Cannon
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 362-6252
Facsimile: (415) 677-9445
Chris@sugarmanandcannon.com

Attorney for Respondent
FELIX SOLORIO VALDOVINOS

I. QUESTION PRESENTED FOR REVIEW

Whether this Court should review a Ninth Circuit Opinion based upon the Attorney General's inaccurate claim that the Ninth Circuit employed the wrong standard of review, when in fact the Ninth Circuit specifically employed the deferential standard of review required under the Antiterrorism and Effective Death Penalty Act (hereafter referred to as "AEDPA").

LIST OF PARTIES

All parties appear in the caption of this case on the cover page.

TABLE OF CONTENTS

I. OPINION BELOW....1

II. JURISDICTION....1

III. STATEMENT OF CASE....1

IV. THE PANEL OPINION APPLIED A DEFERENTIAL STANDARD OF REVIEW AND DID NOT REVIEW THE CALIFORNIA SUPREME COURT'S DECISION USING A *DE NOVO* STANDARD....5

V. UNDER ANY STANDARD OF REVIEW THE BRADY ERRORS IN THIS CASE WERE SUBSTANTIAL AND UNDERMINE CONFIDENCE IN THE VERDICT....6

VI. THE FAILURE TO DISCLOSE A LETTER DESCRIBING THE KILLING AS A CONTRACT DRUG MURDER, WHICH POINTED TO THE CULPABILITY OF A THIRD PARTY, ALLOWED THE STATE TO FALSELY ARGUE THAT THE KILLING HAD NO RELATION TO DRUGS....7

VII. THE FAILURE TO DISCLOSE A PHOTOGRAPH OF MAN IN A HAT SIMILAR TO THE HAT CONNECTED TO THE SHOOTER UNDERMINES CONFIDENCE IN THE VERDICT....9

VIII. THE PROSECUTION'S FAILURE TO DISCLOSE THE PHOTO LINEUPS IN WHICH VALDOVINOS WAS NOT IDENTIFIED, DESPITE BEING THE ONLY PERSON WHOSE PHOTOGRAPH WAS REPEATED, UNDERMINES CONFIDENCE IN THE VERDICT....10

IX. THE LATE DISCLOSURE OF THE GUNS AND DRUGS, AND THE STATE'S FAILURE TO FILE CHARGES BASED UPON THOSE FINDINGS AGAINST ITS MOST IMPORTANT WITNESS, UNDERMINES CONFIDENCE IN THE VERDICT....12

X. THIS CASE WILL NOT BE AFFECTED BY HARRINGTON V. RICHTER....13

XII. CONCLUSION.....14

TABLE OF AUTHORITIES

CASES

Brady v. Maryland, 373 U.S. 83 (1963) ..... passim

Crawford v. Washington, 541 U.S. 36 (2004) 13

Harrington v. Richter, 130 U.S. 1506 (2010) 14

Kyles v. Whitley, 514 U.S. 419 (1995) 7

Richter v. Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc) 13, 14

FEDERAL STATUTES

28 U.S.C. § 1254 (1) 3

MISCELLANEOUS

Transcript of Oral Argument: http://www.ca9.uscourts.gov/datastore/media/2009/09/01/08-15918.wma at 46 secs 8

II. OPINION BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 598 F.3d 568 (9th Cir. 2010)

III. JURISDICTION

This Court has jurisdiction under 28 U.S.C § 1254(1).

IV. STATEMENT OF CASE

Felix Valdovinos was convicted of murder and sentenced to fifty years to life based upon unnecessarily unreliable in-court identifications and the prior, out-of court testimony of Aurelio Lopez, a man with a motive to pin the blame on Valdovinos.

The government had no forensic evidence connecting Valdovinos to the crime and Valdovinos has always maintained he is innocent. The State has repeatedly suppressed exculpatory evidence which is inconsistent with its theory of the case; and when that suppression has been discovered, the State has repeatedly sought to minimize its errors. That minimization continues in this Court where the Attorney General claims that despite the numerous and undisputed failures to disclose exculpatory evidence there was no reasonable doubt that Valdovinos was the killer (Attorney General's Petition for Writ of Certiorari [hereafter "AG"] 23).

---

[1] For ease of reference we will cite to the Attorney General's Appendix to Petition for Writ of Certiorari as App. __a.

The Attorney General is wrong. There is much more than a reasonable doubt that Valdovinos was the killer. The State had a letter indicating that Valdovinos did not do the crime and the crime was a drug murder. The State did not disclose that letter. The State knew its witnesses were shown photo lineups and did not pick out Valdovinos as the killer. The State did not disclose those photo lineups in time for them to be used. The State claimed the identification of Valdovinos was powerful, because "only [Valdovinos] was wearing a cowboy hat, as the killer was"[2] wearing a cowboy hat. The State did not disclose it had pictures of other men at the bar wearing cowboy hats. The State knew that when its witness Aurelio Lopez was arrested, he was on probation and in possession of a gun and more than on ounce of methamphetamine. The State did not disclose that information until after Lopez testified at a preliminary hearing. The State simply released Lopez and did not tell the defense that the State had decided not to charge Lopez with possession of the gun, the drugs or even violate his probation. Lopez did not testify at the trial and his preliminary was not read to the jury.

No rational person would share the State's view of the evidence as powerful. There was no forensic evidence connecting Valdovinos to the murder, and eyewitnesses who were shown two separate photo line-ups did not select Valdovinos as the shooter. Only later, when Valdovinos was being brought to

---

[2] Attorney General Brief in the California Court of Appeal at 23.

court in a jail jumpsuit and shackles, was Valdovinos (mis)identified as the shooter. These unnecessarily unreliable identifications occurred only because the prosecution withheld important exculpatory evidence, the prior failures of the witnesses to identify Valdovinos in the photo lineups.

The state court of appeal found the identifications in this case reliable because it erroneously believed that of all the people at the scene of the crime, only Valdovinos "was consistently identified as wearing a cowboy hat." App. 99a. We now know there was nothing unique about Valdovinos' head gear because the prosecution file contained a picture of another man at the bar where the shooting occurred wearing a black cowboy hat on the evening of the shooting, but the prosecution failed to disclose that picture to the defense.

We now know that Aurelio Lopez, who was the only witness that knew Valdovinos prior to the shooting, was arrested in possession of a gun and drugs just before he told the police Valdovinos had a gun. We also know that the prosecution did not charge Lopez with those crimes, violate his probation, or serve him with a subpoena to secure his presence at trial. The prosecution also failed to provide the information about the gun and the drugs and the failure to file charges to the defense in time for that information to be used to cross-examine Lopez.

We now know that Lopez admitted to Juan Ledezma that he had done the shooting and had placed the blame on Valdovinos. See e.g. App. 111a.

We now know that the police possessed a letter indicating that the murder was a contract killing involving drugs, a theory inconsistent with the prosecution's theory of the case. This letter directly impeached prosecution witness testimony that there was no evidence connecting the murder to drugs. The prosecution did not disclose that letter to the defense – just as it failed to turn over the evidence of the attempted, but unsuccessful, identifications; evidence of the guns and drugs possessed by its star witness; and the photos of other bar patrons dressed in the same fashion that the shooter was described as being dressed.

Singly and together, these multiple failures to disclose exculpatory information undermine confidence in the conviction in this case. Because the state court's affirmation of that conviction was based upon an unreasonable application of settled federal law, the panel decision was correct and we request this Court deny the Attorney General's Petition for Writ of Certiorari.

//

//

//

//

//

IV. THE PANEL OPINION APPLIED A DEFERENTIAL STANDARD OF REVIEW AND DID NOT REVIEW THE CALIFORNIA SUPREME COURT'S DECISION USING A *DE NOVO* STANDARD.

The Attorney General argues that this Court should grant its Petition for a Writ of Certiorari because: "[f]irst the court of appeals here granted the writ by conducting *de novo* review of a claim the California Supreme Court had summarily denied. Second, Valdovinos' claim would have to be rejected under a deferential review." AG 10.

The Attorney General is wrong on both points. First, the court of appeals did not conduct a *de novo* review of a claim the California Supreme Court had summarily denied. Second, assuming arguendo, the court of appeals applied a *de novo* standard, and it did not, as the court of appeals found, Valdovinos should prevail under a deferential review.

Apparently, the Attorney General[3] has forgotten the clear statement of Judge Kleinfeld at oral argument: "I would find this a lot easier to reverse on Brady grounds if it was a direct appeal, but it's AEDPA deference which really concerns me." [http://www.ca9.uscourts.gov/datastore/media/2009/09/01/08-15918.wma at 46 secs.]

---

[3] The same Attorney General who signed the Petition in this case argued the case before the Ninth Circuit.

The Ninth Circuit panel opinion specifically relied upon "the standard set forth in AEDPA" (App. 14a) and specifically noted that, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." App. 14a.

While the panel opinion never indicates that it was applying a *de novo* standard to the California Supreme Court's summary denial, and the language cited above demonstrates that it did not, the panel stated, correctly, that it reviewed the district court's denial of habeas relief *de novo*. The Attorney General's attempt to expand the panel's discussion about the standard of review it used to examine the federal district court's opinion to imply that the panel used the same standard of review to examine the California Supreme Court's decision is simply not supported by the language of the panel opinion, and in fact is contradicted by the language of the panel opinion, and is not a reason this Court should grant the Petition.

V. UNDER ANY STANDARD OF REVIEW THE BRADY ERRORS IN THIS CASE WERE SUBSTANTIAL AND UNDERMINE CONFIDENCE IN THE VERDICT

Moreover, under any standard, including the deferential one employed by the panel in this case, the State's repeated and serious Brady violations "undermine[s] confidence in the outcome of the trial." App. 16a, panel opinion quoting Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

Just as the Attorney General has unreasonably stretched language of the panel opinion to support its claim that a *de novo* standard of review was applied, it has also stretched the underlying facts in its attempt to minimize the devastating effect of the repeated and acknowledged Brady errors in this case. The Attorney General is now attempting to convince this Court to grant its Petition based upon a highly partisan and misleading description of facts. That description demonstrates that the State still does not understand its Brady obligations and this Court should not encourage such reckless claims by granting the requested Petition.

VI. THE FAILURE TO DISCLOSE A LETTER DESCRIBING THE KILLING AS A CONTRACT DRUG MURDER, WHICH POINTED TO THE CULPABILITY OF A THIRD PARTY, ALLOWED THE STATE TO FALSELY ARGUE THAT THE KILLING HAD NO RELATION TO DRUGS

The State's narrow interpretation of its Brady obligations continues before this Court; and depends upon the assumption of facts, which have no support in the record, that: "Valdovinos himself was the writer of the letter or Valdovinos directed the letter to be written in his name." AG 16.

Under the Attorney General's argument, there could never be a reversal for failure to disclose Brady information, as long as there was a theory, no matter how preposterous, that under some theoretical set of facts, not supported by the record, the undisclosed material might not be exculpatory.

Even if the letter was not directly exculpatory, and it was, or even if the letter was preposterously written by Valdovinos, however, the letter still directly impeached the testimony of the investigating Officer Alcantar, who testified that the police had no evidence whatsoever that drugs were behind the murder. ER 471[4].

The defense theory was that Valdovinos is innocent. The murder was a drug murder unrelated to Valdovinos. The prosecution had a letter that bolstered the defense theory and directly contradicted prosecution testimony that the murder had nothing to do with drugs. Instead of turning that material over, as required by Brady, the prosecution buried the letter and allowed its witnesses to falsely claim that the prosecution had no evidence that this was a drug-related murder. After the defense cross-examined Alcantar about the belatedly discovered gun and drugs possessed by Lopez, and sought to characterize the murder as drug-related, the prosecution sought to undermine the defense, by asking Alcantar: "Up until today is there any evidence whatsoever that drugs were behind the murder?" ER 471; see also ER 473. Alcantar answered: "No." The prosecutor continued: "Do you have any information that you haven't or that we haven't shown the jury as to a motive to this case for the killing, in other words, there's something hidden other than just what appears to be a spur of the moment random –"; and again Alcantar

[4] We will cite to the Excerpt of Record filed in the Ninth Circuit, as the Attorney General has done, as ER __

responded: "Nothing else. Nothing that I am aware of." ER 471. The failure to provide the letter bolstered the prosecution's case and allowed Alcantar to testify falsely without fear of impeachment. If the prosecution had not believed that it was important to undermine the defense theory that this was a drug killing, the prosecution would not have had its investigating officer undermine that theory. That undermining, however, occurred through Alcantar's testimony, which we now know was false. The letter was Brady information and the State's failure to turn it over undermines confidence in the verdict.

VII. THE FAILURE TO DISCLOSE A PHOTOGRAPH OF MAN IN A HAT SIMILAR TO THE HAT CONNECTED TO THE SHOOTER UNDERMINES CONFIDENCE IN THE VERDICT

The Attorney General then claims: "Valdovinos never established that the prosecution failed to disclose the Mongia photograph or that defense counsel at the time of trial was unaware of Mongia's involvement in the case." AG 15. This claim is also belied by the record. The Attorney General argued to the State Court of Appeal: "only [Valdovinos] was wearing a cowboy hat, as the killer was." Attorney General Brief in the California Court of Appeal at 43. One of the reasons the state court of appeal excused the prosecution's numerous errors was that it found "only [Valdovinos] was consistently identified as wearing a cowboy hat." App. 99a. Unlike the Attorney General's claims, the record is clear. The prosecution failed to disclose the Mongia photograph.

The Attorney General goes on to argue, consistent with what we now know, but inconsistent with what the State disclosed at the time of the trial, and inconsistent with its argument to the state court of appeal, that the cowboy hat was not an important feature of the (mis)identification because "the shooter was not the only person wearing a cowboy hat at the scene;" and "that regardless of whether a cowboy hat was a 'stand-out characteristic[] of the shooter,' that characteristic had no significant effect on any of the eyewitness identifications." AG 15. As demonstrated above, both the Attorney General and the state court of appeals specifically relied on Valdovinos' unique head covering to support the identification in this case. The suppression of the photograph of another man wearing a cowboy hat undermines confidence in the verdict in this case and should make this Court look with skepticism on all of the Attorney General's claims.

VIII. THE PROSECUTION'S FAILURE TO DISCLOSE THE PHOTO LINEUPS IN WHICH VALDOVINOS WAS NOT IDENTIFIED, DESPITE BEING THE ONLY PERSON WHOSE PHOTOGRAPH WAS REPEATED, UNDERMINES CONFIDENCE IN THE VERDICT

The Attorney General claims, "the court of appeals mistakenly evaluated this belatedly disclosed evidence as if it had never been disclosed." AG 18. The Attorney General also claims that, "the belated disclosure may actually have helped Valdovinos." AG 19. Again, the Attorney General's argument is not based on the record or the Ninth Circuit opinion which specifically describes the belated

disclosed exculpatory photo lineups as "suppressed evidence revealed during trial." App. 19a.

The failure to disclose the prior attempted photographic line-ups in a timely fashion led directly to unnecessarily suggestive in-court show-ups at the preliminary hearing and at trial. Those (mis)identifications of Valdovinos at trial and at the preliminary hearing were undoubtedly affected by their repeated exposure to Valdovinos' photographs at the photo line-ups and to his repeated physical presence at the preliminary hearing and trial. The late disclosure prevented any opportunity for an independent line-up, or even cross-examination, to check specific recollections at a blackboard preliminary hearing. The late disclosure of the repeated photo line-ups removed any chance of a non-suggestive identification process and led to an unnecessarily suggestive identification process. The claim by the Attorney General that this information was received in time to be useful, and that the belated disclosure of the unsuccessful lineups somehow operated to Valdovinos' advantage mischaracterizes both the record below and the panel opinion.

//

//

//

//

IX. THE LATE DISCLOSURE OF THE GUNS AND DRUGS, AND THE STATE'S FAILURE TO FILE CHARGES BASED UPON THOSE FINDINGS AGAINST ITS MOST IMPORTANT WITNESS, UNDERMINES CONFIDENCE IN THE VERDICT.

Unlike all of the other identification witnesses, Lopez was the only person who had known Valdovinos before that evening. There is a huge difference between stranger identification and recognition of a previously known person. At the only opportunity to cross-examine Lopez, at the preliminary hearing, the prosecution failed to disclose the guns and drugs found with Lopez or even his probationary status. Lopez did not appear at trial and his preliminary hearing testimony was read to the jury.[5]

Again the Attorney General ignores the panel's description of this material as "suppressed evidence revealed during trial" (App. 19a), claims the court of appeals evaluated this evidence as if it "was never disclosed;" and goes on to argue that the belated disclosure of the guns and drugs found when Lopez was arrested and the State's decision not to file charges based upon that evidence "did not prejudice the defense." AG 21.

The Attorney General's argument ignores the benefit that Lopez received for his statement and testimony: a get out of jail free card on the new drug and gun charges and a restoration of probation on older charges. Because the defense did

[5] Counsel argued below that this use of preliminary hearing testimony violated Crawford v. Washington, 541 U.S. 36 (2007) and only occurred as a result of ineffective trial counsel's failure to object.

not find out about the new drugs and gun until after the State had released Lopez, the defense was never able to use this information to cross-examine and impeach Lopez. As the panel found, the suppression of this exculpatory evidence was highly relevant to an analysis of the prejudice from the multiple failures to disclose exculpatory evidence.

X. THIS CASE WILL NOT BE AFFECTED BY HARRINGTON V. RICHTER

The Attorney General's primary argument is that this Court should grant review because the issue of whether AEDPA deference applies to a summary denial by the California Supreme Court is pending before this Court; and that if this Court decides AEDPA deference apples to a summary denial, the panel should be reversed because it did not defer to the California Supreme Court. This argument is disingenuous, at best. As indicated above, the panel specifically relied upon "the standard set forth in AEDPA" (App. 14a) and specifically noted that, "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." App. 14a. Apart from the language in the opinion itself, at oral argument, Judge Kleinfeld specifically acknowledged the difference in the standards of review on direct appeal and on habeas. Moreover, Judge Kleinfeld specifically signed the dissent in Richter v.

Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc) which argued that insufficient deference was given the State Court opinion.

The panel here gave deference to the State Court opinion. That deference, however, was overcome by the undisputed facts some of which were not discovered until after the last reasoned State Court opinion.

XI. CONCLUSION

This case is a classic example of a flawed process leading to a bad outcome. The prosecution hid exculpatory evidence so the defense could not use that evidence to cross-examine witnesses at the preliminary hearing. The undisclosed favors that the prosecution gave to the main witness led to the failure of that witness to appear at trial and the inability of the defense to cross-examine that witness regarding his out-of-court statements to the police. The hiding of other evidence led to additional corruption of the memories of the witnesses and led to a misidentification in court. The prosecution also failed to disclose a letter indicating the killing was a contract killing involving drugs and allowed prosecution witnesses to testify that the killing was random and not connected to drugs. The failure to disclose a picture of another bar patron dressed in a black hat, created a false impression that Valdovinos' headwear was somehow unique when in fact it was typical of the patrons at the bar where the shooting occurred. If the prosecution had acted within the bounds of the law and disclosed the evidence as

required by the Constitution, it is possible an investigation may have turned up the real shooter. After all, the police had resources and a letter telling them who had paid for the killing. Instead, the prosecution focused on making a case against Valdovinos; and with questionable identification procedures, and misleading trial tactics secured a conviction.

The misleading tactics by the State have continued in its Petition. The Attorney General claims the panel opinion did not did apply a deferential standard of review. The panel opinion clearly states it applied the deferential standard required under AEDPA. The Attorney General claims the picture of another man wearing a cowboy hat was not suppressed. Yet the Attorney General argued to the state court of appeal, that "only [Valdovinos] was wearing a cowboy hat, as the killer was." Attorney General Brief in the California Court of Appeal at 43. Finally, the Attorney General ignores the language of the panel opinion describing some of the evidence as revealed during trial, and claims the court of appeal evaluated that evidence as if it was never disclosed.[6] The Attorney General's Petition is not based on the facts as found by any of the courts below and its rendition of the "facts" is specifically contradicted by arguments it made in the lower courts.

---

[6] In fact the guns and the drugs were not disclosed in time to use to cross examine the absent Lopez.

This conviction was the result of a complete denial of due process and a misleading of the trier of fact. That misleading description of the facts has continued in the Attorney General's Petition. Granting the requested Petition will only encourage the State to continue to mislead. We respectfully request the Attorney General's Petition be denied.

Respectfully submitted,

Christopher J. Cannon
Attorney for Respondent Felix Valdovinos

170

No. 10-136

COPY
Supreme Court, U.S.
FILED
SEP 8 - 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

ROBERT HOREL, WARDEN, *Petitioner*,

v.

FELIX SOLORIO VALDOVINOS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Jeremy.Friedlander@doj.ca.gov
Counsel for Petitioner

QUESTION PRESENTED

Whether AEDPA deference applies to the state supreme court's summary denial of a claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010) (No. 09-587).

TABLE OF CONTENTS

Page

Argument 1

I. Valdovinos fails to show that the Court of Appeals deferentially reviewed the *Brady* claim summarily rejected by the state supreme court. 1

A. The remark of one judge at oral argument does not show that the Ninth Circuit panel applied deferential review to the state supreme court's decision. 1

B. The Ninth Circuit's recitation of the § 2254(d) deference standard does not show that the court applied it to the *Brady* claim rejected by the state supreme court 2

C. The panel's discussion of the district court's opinion does not show that it applied the deference standard to the *Brady* claim. 4

II. Deferential review would require the Court of Appeals to reject the claim. 5

A. The anonymous letter 5

B. The Mongia photograph 7

C. The photo lineups 8

D. Lopez's gun and drugs 9

TABLE OF CONTENTS
(continued)

Page

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Board of Trade of City of Chicago v. *S.E.C.*
883 F.2d 525 (7th Cir. 1989) 1
Brady v. *Maryland*
373 U.S. 83 (1963) ..... passim
Brown v. *Payton*
544 U.S. 133 (2005) 3
Harrington v. *Richter*
130 S. Ct. 1506 (2010) 1, 4
Richter v. *Hickman*
578 F.3d 944 (9th Cir. 2009) (en banc) 2
Schad v. *Ryan*
606 F.3d 1022 (9th Cir 2010) 3
Wong v. *Belmontes*
558 U.S. ___, 130 S. Ct. 383 (2009) (per curiam) 3

STATUTES

28 United States Code
§ 2254(d) 1, 2

OTHER AUTHORITIES

Antiterrorism and Effective Death Penalty Act of 1996 ..... 1, 3, 4

ARGUMENT

I. VALDOVINOS FAILS TO SHOW THAT THE COURT OF APPEALS DEFERENTIALLY REVIEWED THE *BRADY* CLAIM SUMMARILY REJECTED BY THE STATE SUPREME COURT.

In *Harrington* v. *Richter*, 130 S. Ct. 1506 (2010), 09-587, this Court is considering whether AEDPA (28 U.S.C. § 2254(d)) requires deferential review of a state court's summary disposition. This case raises the same issue. Valdovinos presented to the state supreme court in a state habeas petition an expanded version of the claim he had raised in the lower state court under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The state supreme court summarily denied the claim. As documented in the State's petition (Pet. 11-13), the Ninth Circuit reversed the district court and granted the writ by failing even to consider (much less to deferentially review) the summary denial.

Valdovinos says the Ninth Circuit did apply deference to the state supreme court's decision. He offers three main arguments. None has merit.

A. The Remark of One Judge at Oral Argument Does Not Show that the Ninth Circuit Panel Applied Deferential Review to the State Supreme Court's Decision.

Valdovinos cites Judge Kleinfeld's statement at oral argument: "'I would find this a lot easier to reverse on *Brady* grounds if it was a direct appeal, but it's AEDPA deference which really concerns me.' [Citation]." Opp. 5; see Opp. 13. But statements at oral argument do not establish the considered opinion of the speaker, let alone of the court. See *Board of Trade of City of Chicago* v. *S.E.C.*, 883 F.2d

525, 530 (7th Cir. 1989). This Court reviews the judgment, not the oral argument.

Valdovinos observes that "Judge Kleinfeld specifically signed the dissent in Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc) which argued that insufficient deference was given the State Court opinion." Opp. 13-14. Valdovinos does not explain the relevance of the asserted fact. Perhaps he means to show that Judge Kleinfeld knows the difference between deference and non-deference. See Opp. 13. That fact, too, does not show that the Ninth Circuit actually applied the § 2254(d) deference standard to the state supreme court's decision in this case.

B. The Ninth Circuit's Recitation of the § 2254(d) Deference Standard Does not Show that the Court Applied It to the *Brady* Claim Rejected by the State Supreme Court.

Valdovinos observes that the opinion of the Ninth Circuit recites the deference standard. Opp. 6 (citing App. 14a). He fails to recognize that the circuit court applied that standard only to claims decided by the state appellate court, not the supreme court.

With respect to the former, the court used the language of deference. App. 20a ("Here, the appellate court found that further impeachment of Lopez would not have affected the trial or outcome. On its own, this finding is neither contrary to nor an unreasonable application of established federal law."); App. 24a ("Therefore, we affirm the district court's finding that the state court's decision [rejecting an ineffective assistance claim] was neither contrary to federal law nor an unreasonable application of the law to the facts. [Footnote

omitted.]"). By contrast, the opinion makes no mention of deference with respect to the claims Valdovinos presented to the state supreme court. App. 16a-19a, 20a-22a. The Ninth Circuit held as to those claims. "The prosecution's repeated failure to disclose evidence favorable to the defense leads us to conclude that Valdovinos did not receive a fair trial resulting in a verdict worthy of confidence." App. 22a.

The Ninth Circuit explicitly mentioned the state supreme court's decision only in the procedural history of the opinion. App 8a, 9a. A later passage states cryptically that a summary denial requires "an independent review of the record. [Citation omitted.]" App 14a By using the language of deference to review the claims decided by the state appellate court but not the state supreme court, and by not even mentioning the state supreme court's decision in any substantive way, the Ninth Circuit made clear that it was not deferentially reviewing that decision, if reviewing it at all.

In any event, the circuit court's recitation of an applicable legal standard does not by itself establish that the court actually applied that standard. See *Wong* v. *Belmontes*, 558 U.S. ___, 130 S. Ct. 383, 390 (2009) (per curiam) ("While the Court of Appeals quoted the pertinent language from *Strickland*, that court elsewhere suggested it might have applied something different."); *Brown* v. *Payton*, 544 U.S. 133, 140 (2005) (Ninth Circuit "purported to decide the case under the deferential standard AEDPA mandates"); *id.* at 147 (Ninth Circuit erred when it "made the . . . assumption" that the state supreme court acted unreasonably in rejecting the claim); *Schad* v. *Ryan*, 606 F.3d 1022, 1030 n.2 (9th Cir. 2010) (Callahan, J., dissenting) (collecting cases in

which this Court has found that the Ninth Circuit applied AEDPA deference incorrectly, if at all).

C. The Panel's Discussion of the District Court's Opinion Does not Show that It Applied the Deference Standard to the *Brady* Claim.

Valdovinos says petitioner "attempt[s] to expand the panel's discussion about the standard of review it used to examine the federal district court's opinion to imply that the panel used the same standard . . . to examine the California Supreme Court's decision. . . ." Opp. 6. Valdovinos says petitioner's purported argument "is simply not supported by the language of the panel opinion, and in fact is contradicted by [it]. . . ." Opp. 6. Valdovinos's response lacks citation to either our petition or the opinion below. Petitioner has not suggested that the Ninth Circuit's application of de novo review to the district court's opinion means that the Ninth Circuit applied de novo review to the state supreme court's decision.

Because the Ninth Circuit did not apply deference to the state supreme court's summary disposition, *Richter* controls this case. As shown in the petition (Pet. 14-23) and below, deferential review would compel the Ninth Circuit to reverse its decision granting the writ.

II. DEFERENTIAL REVIEW WOULD REQUIRE THE COURT OF APPEALS TO REJECT THE CLAIM.

Valdovinos says, "the *Brady* errors in this case were substantial and undermine confidence in the verdict[.]"[1] Opp. 6. He is wrong in every case.

A. The Anonymous Letter

On March 30, 2004, associate habeas counsel found an anonymous letter in a file in the police department. App. 71a; ER 127-128. The writer of the letter disclaimed responsibility for the shooting and said Ramon Balemas ordered it. App.71a-72a; ER 150-151. An envelope attached to the letter was addressed to "Eulalio Caballero" and postmarked October 2, 1998. ER 154 The trial began in November 1998. CT 139. There is no indication in the record of how or when the letter reached the police file.

The Ninth Circuit found the letter's nondisclosure prejudicial because it "denied the defense important investigative opportunities. . . ."

---

[1] Valdovinos accuses petitioner of distorting the record and misunderstanding *Brady* Opp. 7 It is only Valdovinos who has done so To take just one example beyond those addressed in the text, Valdovinos states "We now know that Lopez admitted to Juan Ledezma that he had done the shooting and had placed the blame on Valdovinos See, e g , App. 111a " Opp 3 We would "know" that only if we chose to ignore, as Valdovinos does, the evidence in the record (summarized at Pet 7), the findings of the district court (App. 74a-75a), and even the determinations of the Ninth Circuit (App 16a) Valdovinos's sole support for his statement is the part of his own state habeas petition in which he makes the same unsubstantiated and unreliable assertion App 112a-113a

App. 19a. The court overlooked the facts that (1) Valdovinos himself or someone on his behalf could have written the letter, (2) trial counsel never said he was unaware of the information, (3) the court did not identify any "important investigative opportunities" the defense lost from the nondisclosure, Pet. 16-17, and (4) the defense never established even that the prosecution possessed the letter at the time of trial. Pet. 17 n. 6.

Valdovinos responds: "Under the Attorney General's argument, there could never be a reversal for failure to disclose *Brady* information, as long as there was a theory, no matter how preposterous, that under some theoretical set of facts, not supported by the record, the undisclosed material might not be exculpatory." Opp. 7. Unburdened by record citation or authority, Valdovinos's argument fails to explain what is "preposterous" about any of petitioner's points. Counsel said only that he did not become aware of the letter until the defense investigator showed it to him in 2004. ER 157. Counsel said *nothing* about its contents or what he already knew at trial about a "drug killing." Such silence is telling because it is well established that no *Brady* violation occurs if counsel knew of the suppressed information or even if he could have learned it on his own. Pet. 16-17 (cases cited). Rather than defend counsel's studiously unrevealing declaration, Valdovinos ignores it.

Valdovinos writes, "Instead of turning that material over, as required by *Brady*, the prosecution buried the letter and allowed its witnesses to falsely claim that the prosecution had no evidence that this was a drug-related murder." Opp. 8. The argument fails because it assumes that the prosecution possessed the letter at the time of trial. Valdovinos

fails to rebut the State's explanation of why that assumption is unwarranted. Pet. 17 n.6.

Stressing testimony from prosecution witnesses and argument from the prosecutor that no evidence showed the killing to be drug related, Valdovinos says the letter would have discredited that argument. Opp. 8-9 But Valdovinos ignores the fact that defense counsel effectively rebutted the argument without the letter, arguing to the jury that the victim was a drug dealer and drug user and that Lopez was an armed drug dealer. App. 73a-74a (district court's opinion). Regardless, Valdovinos himself acted exactly like a "hit man" in a drug killing. Pet. 22. For that reason as well, additional evidence that the killing was a drug killing would not have helped him. Likewise, the letter was not material evidence, so its nondisclosure entitled Valdovinos to no relief under *Brady*.

B. The Mongia Photograph

The State explained that Valdovinos never established that the prosecution failed to disclose the photograph showing Jose Mongia in a cowboy hat. Pet. 15. Valdovinos responds by claiming that, in the state appeal, the State incorrectly argued and the state appellate court incorrectly found that only Valdovinos had worn a cowboy hat. Opp. 9. Valdovinos takes these comments out of context. But it is unnecessary to address them further because his argument fails regardless. Arguments or remarks in the state appeal about the significance of the shooter wearing a cowboy hat say nothing about the evidence disclosed to the defense at trial. If the prosecution had not disclosed the Mongia photograph, trial counsel would have said so in his declaration in support of Valdovinos's habeas traverse, just as counsel said the prosecution never disclosed the

anonymous letter blaming Balemas for the killing. ER 157. Valdovinos ignores this point. So did the Ninth Circuit.

Seeking to rebut the State's demonstration that the Mongia photograph added nothing of significance, Valdovinos says the photo showed that he was not the only one wearing a cowboy hat. Opp. 10. Valdovinos ignores the undisputed evidence at trial showing the same thing. Pet. 15. He also ignores the fact that none of the three persons who identified him as the shooter did so because he was wearing a cowboy hat. Pet. 15. If anything, they made the identifications in spite of that fact. Pet. 15. Because it made no difference that the shooter wore a cowboy hat, the Mongia photo made no difference either.

C. The Photo Lineups

The Ninth Circuit said "[t]he photo lineup evidence rendered the [in-court eyewitness] identifications questionable." App. 21a. By assessing the in-court identifications in light of the photo lineups themselves, the Ninth Circuit incorrectly assumed that the jury had been unable to assess the identifications in that way, when in fact the jury *was* able to do so because the prosecution disclosed the lineups at trial, albeit belatedly. Pet. 18. Noting that an instruction had drawn the jury's attention to the untimely disclosure and that defense counsel excoriated the police about it, the State's petition explained how the belated disclosure may actually have helped the defense. Pet. 19.

Valdovinos says that the State's argument is "not based on the record or the Ninth Circuit opinion which specifically describes the belated[ly] disclosed exculpatory photo lineups as 'suppressed evidence revealed during trial.' App. 19a." Opp. 10-11. He is mistaken. The Ninth Circuit did not describe the

photo lineups as "suppressed evidence revealed during trial." The court applied that description to the gun and drugs found in Lopez's apartment. App. 19a. In any event, the Ninth Circuit's analysis (such as it was) was consistent with nondisclosure, rather than belated disclosure (as explained above), so whatever description the court may have used at an earlier part of its opinion is irrelevant.

Valdovinos says the belated disclosure "prevented any opportunity for an independent line-up, or even cross-examination, to check specific recollections at a blackboard preliminary hearing." Opp. 11 The district court rejected this argument. App. 68a-69a. It observed that Valdovinos "does not state how he could have more effectively cross-examined either Diaz or Castro than he did at the trial[,]" App. 68a, and he "does not explain how knowing of the photo lineups would have helped him obtain a blackboard preliminary hearing; his argument for the blackboard hearing was based upon his assumption that neither Castro nor Diaz had seen a photo lineup," App. 69a. The district court also found that the record "belied" Valdovinos's contention that "the witnesses' identification of him at the preliminary hearing were tainted by the undisclosed photo lineups. . . ." App. 69a The Ninth Circuit did not dispute any of these district court findings. Valdovinos ignores those findings and their tacit acceptance by the Ninth Circuit. Likewise, he fails to show that the state courts unreasonably resolved the claim against him.

D. Lopez's Gun and Drugs

The Ninth Circuit accepted the state appellate court's holding that the belated disclosure of Lopez's gun and drugs was not a *Brady* violation in itself. App. 20a. However, the Ninth Circuit said that "the

failure to disclose the gun and drugs found in Lopez's possession . . . only further solidifies our finding of collective prejudice." App. 22a. The State pointed out that the Ninth Circuit "appears to have considered the belated disclosure of the evidence at trial as if the evidence was never disclosed" and failed to explain how the error "solidifie[d]" prejudice. Pet. 21.

On the first point, Valdovinos again accuses the State of "ignor[ing] the panel's description of this information as 'suppressed evidence revealed during trial' (App. 19a). . . ." Opp. 12. The State ignored that language because the Ninth Circuit did, too, when it actually analyzed the error. At that later point, the court described the error as "the failure to disclose the gun and drugs. . . " App 22a. Notwithstanding its earlier description, then, the court lost sight of what the alleged *Brady* error actually was. By failing to explain how the belated disclosure added prejudice, the court made only more clear that it misunderstood the nature of the error.

Valdovinos argues that the belated disclosure at trial prevented the defense from using information about the drugs and gun to cross-examine Lopez, who absconded after testifying at the preliminary hearing. Opp. 13-14. The state appellate court (App. 99a), the district court (App. 70a), and the Ninth Circuit (App. 20a) all rejected this argument. As indicated by those courts, defense counsel's argument to the jury about the favorable treatment Lopez received from law enforcement after the discovery of the gun and drugs was no less effective than anything defense counsel would have said to the jury if he had been able to confront Lopez with the gun and drugs at the preliminary hearing. Valdovinos ignores the unanimity of opinions on the point. He

fails to show the state courts acted unreasonably in rejecting his arguments.

CONCLUSION

The petition for certiorari should be granted.

Dated: September 8, 2010

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

SF2008401355
40461720.doc

No. 10-136

IN THE SUPREME COURT OF THE UNITED STATES

FEB 16 2011
OFFICE OF THE CLERK

ROBERT HOREL, WARDEN

Petitioner,

v.

FELIX SOLORIO VALDOVINOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR RECONSIDERATION
OF ORDER OF REMAND**

RECEIVED
FEB 25 2011

Christopher J. Cannon (CBN 88034)
Sugarman & Cannon
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 362-6252
Facsimile: (415) 677-9445
Chris@sugarmanandcannon.com

Attorney for Respondent
FELIX SOLORIO VALDOVINOS

TABLE OF CONTENTS

INTRODUCTION.....1

I. THE NINTH CIRCUIT APPLIED THE DEFERENTIAL STANDARD OF REVIEW REQUIRED UNDER AEDPA.....3

II. ANY CLAIM THAT THE SUBSTANTIAL AND REPEATED BRADY ERRORS IN THIS CASE WERE NOT MATERIAL AND DID NOT UNDERMINE CONFIDENCE IN THE VERDICT WOULD BE CLEARLY UNREASONABLE.....7

CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

Brady v. Maryland, 373 U.S. 83 (1963).....1, 4, 5, 7, 8, 10

Harrington v. Richter, 131 S. Ct. 770 (2011).....1, 3, 6, 7, 8

Kyles v. Whitley, 514 U.S. 419 10

Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009).....6, 7

Schiro v. Landrigan, 550 U.S. 465 (2007).....3

United States v. Antonakeas, 255 F.3d 714 (9th Cir. 2000).....10

United States v. Jernigan, 492 F.3d 1050 (9th Cir. 2007) 11

United States v. Wade, 388 U.S. 218 (1967).....11

Valdovinos v. McGrath, 598 F.3d 568 (9th Cir. 2010).....3, 4, 5, 6

FEDERAL STATUTES

28 U.S.C. § 2254(d) 3

INTRODUCTION

There is no reason to remand this case for reconsideration in light of Harrington v. Richter, 131 S. Ct. 770 (2011), because the Ninth Circuit panel opinion gave the state court summary denial the level of deference required under the Anti-terrorism and Effective Death Penalty Act [hereinafter "AEDPA"] as clarified by Harrington v. Richter.

Harrington v. Richter states that:

> [a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, supra, 131 S.Ct. at 786-787.

As the Ninth Circuit found, the California court's failure to recognize the repeated, substantial, Brady[1] errors in this case was so lacking in justification as to be clearly unreasonable. Any other conclusion would be clearly unreasonable as that term is defined in AEDPA and Harrington v. Richter. No fair minded jurist, in an identification case where there is no corroborating evidence[2] could conclude

---

[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] There was trial testimony that Valdovinos' car generally matched a description of the killer's car and Valdovinos left the state shortly after the shooting.

that the prosecution's failure to disclose multiple items undermining the (mis)identification was not material.

The prosecution failed to disclose: (1) a photograph of another man at the crime scene wearing a cowboy hat just as the killer was described to be dressed[3]; (2) a letter describing the killing as a drug killing, which directly impeached the prosecution's theory of the case and the testimony of its primary law enforcement witness; and (3) police documents concerning the drugs and gun found in the possession of the only witness who knew Valdovinos prior to the evening of the shooting which gave that witness a strong motive to give favorable testimony to the police. No reasonable jurist could find the combination of this undisclosed evidence was not material.

//

//

//

---

[3] The importance of this evidence is demonstrated by the Attorney General's false argument to the California Court of Appeals that "only [Valdovinos] was wearing a cowboy hat, as the killer was...," Attorney General Brief in the California Court of Appeal at 43, as well as that court's reliance upon the clearly unreasonable factual finding that "only appellant was consistently identified as wearing a cowboy hat," to deny the original appeal in this case. Opinion by Court of Appeal of the State of California, Sixth Appellate District, filed August 23, 2000; Appendix to Petition for Writ of Certiorari [hereinafter "App."] at 99a.

I. THE NINTH CIRCUIT APPLIED THE DEFERENTIAL STANDARD OF REVIEW REQUIRED UNDER AEDPA.

The Ninth Circuit specifically employed the highly deferential standard of review set out in AEDPA, even as tightened by this Court in Harrington v. Richter. The Ninth Circuit specifically stated that:

> In accordance with the standard set forth in AEDPA, a court may grant a writ of habeas corpus only if the state court's ruling: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' Valdovinos v. McGrath, 598 F.3d 568, 576 (9th Cir. 2010) [hereinafter "Valdovinos"], quoting 28 U.S.C. § 2254(d); App. 14a.

The Ninth Circuit also specifically quoted this Court's opinion in Schiro v. Landrigan, 550 U.S. 465, 473 (2007), emphasizing that: "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." Valdovinos at 576; App. 14a.

As indicated above, the Ninth Circuit specifically relied upon "the standard set forth in AEDPA" and specifically noted that, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect,

but whether that determination was unreasonable—a substantially higher threshold." Id.

The language and analysis of the Ninth Circuit opinion further demonstrates that the Ninth Circuit deferred to the state court which held that the failure to disclose the guns and drugs, *by itself*, was not a reversible Brady error. Valdovinos at 579-580; App. 20a-22a.

The summary denial, however, was clearly unreasonable as a result of the *combination* of the failure to disclose the drugs and gun *with* the newly discovered failure to disclose the photo of another man dressed as the shooter was described to be dressed wearing a cowboy hat, and the failure to disclose the letter describing the killing as a drug killing. The Ninth Circuit expressly found that this combined and repeated failure to disclose Brady information rendered the state court's summary denial unreasonable.

The Ninth Circuit wrote:

> Here, the appellate court found that further impeachment of Lopez would not have affected the trial or outcome. On its own, this finding is neither contrary to nor an unreasonable application of established federal law. However, we include the prosecutor's failure to disclose the gun and methamphetamine in the cumulative analysis below. Id. at 579; App. 20a.

The Ninth Circuit specifically stated that it was only when it viewed the suppressed evidence collectively, that the state court finding of no Brady error was clearly unreasonable:

> We find the cumulative effect of the suppressed evidence denied Valdovinos a fair trial. The prosecution's repeated failure to disclose evidence favorable to the defense leads us to conclude that Valdovinos did not receive a fair trial resulting in a verdict worthy of confidence. Thus, we reverse with regard to the Brady claim and remand with instructions to the district court to issue a writ of habeas corpus." Id. at 580; App. 22a.

Accordingly, the panel's express statements that it applied the highly deferential standard of review required under AEDPA, is consistent with the analysis in its opinion and should not be discarded.

In addition to the language in the opinion itself, at oral argument Judge Kleinfeld specifically acknowledged the difference in the standards of review on direct appeal and on habeas. Judge Kleinfeld specifically told the parties: "I would find this a lot easier to reverse on Brady grounds if it was a direct appeal, but it's AEDPA deference which really concerns me."[4] Then, in their written opinion, the panel specifically stated it was relying upon: "the standard set forth in AEDPA," and specifically noted that, "[t]he question under AEDPA is not whether a federal

---

[4] http://www.ca9.uscourts.gov/datastore/media/2009/09/01/08-15918.wma, at 46 secs.

court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." Valdovinos at 575, App. 14a.

In addition to the language and analysis of the Ninth Circuit opinion, and Judge Kleinfeld's[5] specific acknowledgment of the difference in the standards of review on direct appeal and on habeas, Judge Kleinfeld signed the dissent in Richter v. Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc) which argued that the Ninth Circuit majority gave insufficient deference to the state court opinion in Harrington v. Richter; and described the AEDPA standard of review as "truly daunting." Richter v. Hickman, 578 F.3d 944, 977 (9th Cir. 2009), dissenting opinion. That dissent expressly stated that if "the matter is surely open to debate and discussion," AEDPA prohibits a reversal. Id. at 986. That dissent mirrors the language of this Court in Harrington v. Richter:

> "Objectively unreasonable" does not mean that we can grant the habeas petition if we merely disagree with the state court's decision, or would have decided oppositely in the first instance. [cit.] Nor can we decide that a state court was unreasonable *even if* we believe it committed a clear error. [cit.] Rather, to overturn the state court's decision, its judgment about counsel's performance must be so egregious that we cannot but be convinced that the court's decision is itself outside the bounds

---

[5] Judge Fletcher was not a member of the en banc panel in Richter v. Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc).

> of reasonableness. Richter v. Hickman, 578 F.3d 944, 977-978 (9th Cir. 2009) (emphasis in original).

At the time the Ninth Circuit opinion was issued in this case, this Court had already granted cert in Harrington, and as the comments of Judge Kleinfeld and the language of the opinion demonstrate, the Ninth Circuit panel in this case was well aware of the "daunting" amount of deference required under AEDPA.

Even the Attorney General now admits that it "has not suggested that the Ninth Circuit applied *de novo* review to the California Supreme Court's decision," Petitioner's Reply at 4. Nevertheless, petitioner claims that the Ninth Circuit did not apply deference to the state court's summary disposition. This claim ignores the language of the Ninth Circuit Opinion, as well as the specific statement of one of the Judges at oral argument. Because the panel opinion gave appropriate deference to the state court, the Order remanding this case should be reconsidered.

II. ANY CLAIM THAT THE SUBSTANTIAL AND REPEATED BRADY ERRORS IN THIS CASE WERE NOT MATERIAL AND DID NOT UNDERMINE CONFIDENCE IN THE VERDICT WOULD BE CLEARLY UNREASONABLE.

Any claim that the substantial and repeated Brady errors in this case were not material and did not undermine confidence in the verdict would be clearly unreasonable. Any reasonable jurist would agree that in an identification case,

with no corroborating evidence, the type of evidence the state failed to disclose here was material.

The state had no forensic evidence connecting Valdovinos to the crime and Valdovinos has always maintained he is innocent. The state has repeatedly suppressed exculpatory evidence which is inconsistent with its theory of the case; and when that suppression has been discovered, the state has repeatedly sought to minimize its errors.

The Attorney General has repeatedly claimed the letter and photograph were not Brady material. That position is unreasonable. As the Ninth Circuit found, a claim that the letter and the photograph were not Brady material is clearly unreasonable.

In its Petition for a Writ of Certiorari and in its Reply to Brief in Opposition, the Attorney General seems to be arguing that if it is possible to make an argument to support the state opinion, then that opinion must be deferred to. This argument overlooks the requirement of AEDPA and Harrington v. Richter, that the argument *must be reasonable*. Just because the Attorney General can argue that space aliens put the letter and photo in the prosecution file, that does not make the argument reasonable.

The undisputed facts are that a letter was discovered in the prosecutor's file at the San Jose Police Department with the rest of the evidence in this case. Declaration of Kathleen Boyle filed in the Ninth Circuit, May 25, 2004; ER 127-129. That letter was accompanied by an envelope postmarked September 9, 1998, a month before the trial. See ER 154. That letter was never voluntarily disclosed by the state and was only discovered by independent defense investigation. See Declaration of Thompson Sharkey filed in the Ninth Circuit, May 25, 2004; ER 157.

The Attorney General also unreasonably argues that there is a dispute regarding whether the state possessed the photo of another man in a hat, and fantasizes that the defense knew of the photo. Again, this argument is unreasonable. If the defense knew of the hat, the defense would have been able to counter the argument made by the same Attorney General to the state court of Appeal: "only [Valdovinos] was wearing a cowboy hat, as the killer was." Attorney General Brief in the California Court of Appeal at 43.

Because the defense did not know of the photo of Mongia in the hat, the defense was unable to counter this false argument on appeal[6]. This

---

[6] We are not contending that the particular deputy attorney general handling this case knew of the material in the prosecution file. Even if this particular deputy

misrepresentation by the Attorney General led to the clearly unreasonable "finding" by the state court of appeal that "only [Valdovinos] was consistently identified as wearing a cowboy hat." App. 99a. Unlike the Attorney General's claims, the record is clear. The prosecution failed to disclose the Mongia photograph.

Now that the suppressed Brady material has been disclosed, it is unreasonable to believe the Brady violations here do not "undermine confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434. While we contend there is much more than a reasonable doubt that Valdovinos was the killer; there can be no dispute that the undisclosed and newly discovered evidence undermines confidence in the verdict. This was a simple identification case, and the undisclosed information undermines confidence in those prior, unnecessarily suggestive, in court show ups.[7]

---

attorney general did not know of the photo and the letter, however, for Brady purposes, he is charged with knowledge of evidence in the prosecution file. The government's Brady obligation "is independent of whether, at the time, the prosecutor knew of the favorable evidence or appreciated its significance." United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2000), citing Kyles v. Whitley, 514 U.S. 419, 437-8 (1995).

[7] It is worth nothing that the only reason for the unnecessarily suggestive in court show ups was the prosecution's suppression of prior failed attempts at identification through a photo lineup.

As this Court recognized in United States v. Wade, 388 U.S. 218, 228 (1967), "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."

> Centuries of experience in the administration of criminal justice have shown that a conviction based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence. United States v. Jernigan, 492 F.3d 1050, 1054 (9th Cir. 2007), quoting Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978).[8]

There was no confession, statements by codefendants or any forensic evidence indicating Valdovinos was the shooter. The state had a letter indicating that Valdovinos did not do the crime and the crime was a drug murder. The state did not disclose that letter. The state knew its witnesses were shown photo lineups and did not pick out Valdovinos as the killer. The state did not disclose those photo lineups in time for them to be used. The state claimed the identification of Valdovinos was powerful, because "only [Valdovinos] was wearing a cowboy hat, as the killer was [wearing a cowboy hat]." The state did not disclose it had a

---

[8] "Of more than 300 documented cases of wrongful conviction in the U.S., nearly two-thirds are the result of erroneous identification." California Innocence Project Frees Fifth Innocent Man, California Western School of Law News, Feb. 23, 2007, available at http://cwslnews.wordpress.com/2007/02/23/california-innocence-project-frees-fith-innocent-man/.

picture of another man at the bar wearing a cowboy hat. The state knew that when its witness Aurelio Lopez was arrested, he was on probation and in possession of a gun and more than an ounce of methamphetamine. The state did not disclose that information until after Lopez testified at a preliminary hearing. The state simply released Lopez and did not tell the defense that the state had decided not to charge Lopez with possession of the gun, the drugs or even violate his probation. Lopez did not testify at the trial and his preliminary hearing testimony was read to the jury.

No reasonable person would accept the Attorney General's argument that the evidence was powerful. Eyewitnesses who were shown two separate photo line-ups did not select Valdovinos as the shooter. Only later, when Valdovinos was being brought to court in a jail jumpsuit and shackles, was Valdovinos (mis)identified as the shooter. These unnecessarily unreliable identifications occurred only because the prosecution withheld important exculpatory evidence, the prior failures of the witnesses to identify Valdovinos in the photo lineups.

The California Court of Appeal found the identifications in this case reliable because it erroneously believed that of all the people at the scene of the crime, only Valdovinos "was consistently identified as wearing a cowboy hat." Opinion by the Court of Appeal of the State of California, Sixth Appellate District, filed August

23, 2000; App. 99a. We now know there was nothing unique about Valdovinos' head gear because the prosecution file contained a picture of another man at the bar where the shooting occurred wearing a black cowboy hat on the evening of the shooting, but the prosecution failed to disclose that picture to the defense.

We now know that Aurelio Lopez, the only witness[9] who knew Valdovinos prior to the shooting, was arrested in possession of a gun and drugs just before he told the police Valdovinos had a gun. We also know that the prosecution did not charge Lopez with those crimes, violate his probation, or serve him with a subpoena to secure his presence at trial.

We also now know the prosecution also failed to provide the information about the gun and the drugs and the failure to file charges to the defense in time for that information to be used to cross-examine Lopez.

We also now know that Lopez admitted to Juan Ledezma that he had done the shooting and had placed the blame on Valdovinos. See e.g., Valdovinos' Second State Habeas Petition; App. 111a.

We also now know that the police possessed a letter indicating that the murder was a contract killing involving drugs, a theory inconsistent with the

---

[9] Lopez did not appear at the trial and his testimony from the preliminary hearing was read to the jury.

prosecution's theory of the case. This letter directly impeached prosecution witness testimony that there was no evidence connecting the murder to drugs. The prosecution did not disclose that letter to the defense-just as it failed to turn over the evidence of the attempted, but unsuccessful, identifications; evidence of the guns and drugs possessed by its star witness; and the photo of another bar patron dressed in the same fashion that the shooter was described as being dressed.

Singly and together, these multiple failures to disclose exculpatory information undermine confidence in the verdict in this case. No reasonable jurist can have confidence in this verdict. Because the state court's affirmance of that conviction was based upon an unreasonable application of settled federal law, the panel decision was correct and we request this Court reconsider its Order remanding this case for reconsideration in light of Harrington v. Richter.

//

//

//

//

//

//

//

CONCLUSION

The panel here gave deference to the state court opinion. That deference, however, was overcome by the undisputed facts. This conviction was the result of a complete denial of due process and a misleading of the trier of fact. Remanding this case to the Ninth Circuit for reconsideration will only encourage the state to continue to hide evidence.

We respectfully request this Court reconsider its Order of Remand.

Date: 2/15/11

Respectfully Submitted,

Christopher Cannon
Attorney for Felix Valdovinos